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ABSTRACT

While the Education for All Handicapped Children Act of 1975 (Public Law 94-142) and Section 504 of the Rehabilitation Act of 1973 first established the basic framework for determining the rights of handicapped students, both the courts and Congress are continually interpreting and changing the standards. The eight papers included in this publication are presented to update school attorneys on changes in the law since the original edition of "Schools and the Law of the Handicapped" was first published in 1980, and to provide some new perspectives on various aspects of the laws and their regulations. The titles and authors of the papers are: "The Education of Handicapped Children: An Overview" by John W. Bowen; "Due Process Considerations under Section 504 and Public Law 94-142" by Michael J. Julka; "Public Law 94-142: Identification and Evaluation" by Carmela M. Bowns; "Public Law 94-142: What Constitutes a Related Service?" by Sharon Howard; "Tests and the Placement of Handicapped Students" by Thomas M. Griffin; "Educational Placement of the Handicapped: Selected Issues" by Michael I. Levin; "Disciplining the Handicapped Student" by Patricia W. Morrison; and "Liability for Wrongful Identification, Evaluation or Placement--Is There Malpractice?" by Edward W. Remsburg. Footnotes for each paper contain legal citations. (Author/MLF)

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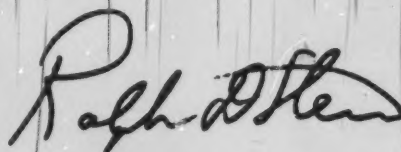
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FOREWORD

While the Education for All Handicapped Children Act of 1975 and §504 of the Rehabilitation Act of 1973 first established the basic framework for determining the rights of handicapped students, both the courts and the Congress are continually interpreting and changing the standards with which school boards must comply. On June 29, 1981, the National Council of School Attorneys held its second symposium on new developments in the law affecting education of handicapped students. This publication is the outgrowth of that meeting, and it is presented with a dual purpose: both to update the school attorney on changes in the law since the original edition of *Schools and the Law of the Handicapped* was first published in 1980 and to provide some new perspectives on various aspects of the laws and their regulations.

Much time and effort has gone into preparing this revised edition of *Schools and the Law of the Handicapped*. I would like to thank the contributors to this publication, as well as Eve Malakoff for the excellent job she has done in editing and ensuring the accuracy and completeness of this publication.



Ralph D. Stern
Chairman
NSBA Council of School Attorneys

THE EDUCATION OF HANDICAPPED CHILDREN:
AN OVERVIEW

By: John W. Bowen

INTRODUCTION

It would be useful -- but almost certainly impossible -- to cover all of the significant state agency decisions, Office of Civil Rights and Office of Special Education rulings and policy letters that have come out in the past year dealing with the education of handicapped children. Instead, this article will review some of the recent federal court decisions dealing with this subject area.

Before proceeding with the cases, however, it is necessary to note that all the regulations adopted under Section 504 and P.L. 94-142 were recodified and redesignated because of the establishment of the Department of Education. The regulations under Section 504 were transferred from 45 CFR Part 84 to 34 CFR Part 104 effective May 9, 1980. P.L. 94-142 regulations were transferred from 45 CFR Part 121a to 34 CFR Part 300 effective November 21, 1980.

RELATED SERVICES

Under the Education for All Handicapped Children Act of 1975, ¹ a handicapped child is entitled to a free, appropriate public education consisting of special education and related services designed to meet the special needs of the handicapped child. The regulations define related services as including:

transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counselling services, and medical services for diagnostic and evaluation purposes. The term also includes school health services, social work services in the school, and parent counselling and training. ²

Recently, school districts have had to confront changing interpretations on how far the courts will go in including certain services within the classification of related services to which a handicapped child may be entitled. The case of *Tatro v. Texas*³ provides a useful model to examine the nature of this problem.

Amber Tatro is a four-year-old child with spina bifida, causing her to suffer from both orthopedic and speech handicaps, along with a neurogenic bladder. Because of the neurogenic bladder, Amber cannot empty her bladder voluntarily and has to be catheterized every three or four hours to avoid developing chronic and possibly fatal kidney infection. The school district developed an Individualized Education Program (IEP) that was satisfactory to the parents in all respects but one. It failed to provide for the Clean Intermittent Catheterization (CIC) to be administered to Amber during the school day.

Amber's challenge to the school system's denial of the CIC in the federal district court was unsuccessful.⁴ The court, although sympathizing with her plight, concluded that the CIC was not a related service in the statutory sense because it did not arise from the effort to educate. The court pointed out that:

...[t]here is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life, but once that life maintenance service is provided, it is unrelated to her learning skills.⁵

Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs.⁶

However, in an opinion issued on September 2, 1980, the Fifth Circuit Court of Appeals reversed the district court and ruled that the school system was obligated to provide Clean Intermittent Catheterization as one of the related services to which the child was entitled.⁷ The court reasoned that Amber was entitled to a free, appropriate public education which should be provided in the regular classroom to the maximum extent possible.⁸ To accomplish this in Amber's case, it is necessary to provide catheterization while she is at school. Ergo, the catheterization is a "supportive service" that is required to assist a handicapped child to benefit from special education.⁹

Following the *Tatro* decision, the Department of Education on January 19, 1981, published a policy interpretation defining catheterization as a related service when it is required in order to provide a free, appropriate public education in the least restrictive environment.¹⁰ However, the effective date of the interpretation was twice postponed by the Reagan administration, first to March 30, then to May 10.¹¹ On May 8, the operative date of the interpretation was indefinitely postponed by the Department.¹²

Another approach to the question of what services a school must provide is found in the Second Circuit. The court, in *Rowley v. Board of Education of Hendrick Hudson Central School District*,¹³ emphasized the interpretation of the term "appropriate education" rather than "related services." Affirming the district court decision in *Rowley*, the appellate court held that requiring the school district to furnish a deaf child with the services of a sign language interpreter in the classroom was part of the free, appropriate public education to which the child was entitled.¹⁴ The district court interpretation of what the legislation and regulation intended by the term "appropriate education" had stated that:

'[A]n appropriate education' could mean an 'adequate' education -- that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential.¹⁵

However, the court rejected both extremes in favor of a position described as being "between" the two extremes, and requiring that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children to achieve their full potential." The court did acknowledge that some problems might arise in the application of its standard:

The difficulty with the standard, of course, is that it depends on a number of different measurements that are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children.¹⁷

Although the district court set forth its standard for an appropriate education and the circuit court affirmed it, neither appeared to have actually applied it. Instead, they seemed to be swayed by a finding of fact by the district court that without a sign language interpreter, only 59% of what transpired in the classroom was accessible to the deaf child, while 100% would be accessible to her with a sign language interpreter. ¹⁸ The district court also pointed out that there was expert testimony that every deaf child fares better in class with an interpreter and concluded that the child's academic education would be "more appropriate" with than without an interpreter. ¹⁹

The actual standard, then, appears to be that if a service will provide a better education to the handicapped child than would be the case without the service, then the school system should have to provide the service -- not the test enunciated by the court of comparing ratios of potential to actual performance.

To forestall worries about the decision being widely cited against other school districts, the Second Circuit specifically ruled that their decision was restricted to the unique facts of the *Rowley* case and that the decision could not be cited as authority in any other case. ²⁰ Nevertheless, state and local educational agencies have filed a petition for certiorari with the United States Supreme Court. ²¹

In examining this issue, the decision in *Camenisch v. University of Texas* ²² is worth noting. That case involved the question of whether or not an educational agency was required to provide a sign language interpreter for a deaf student at the post-secondary education level. The Fifth Circuit there affirmed the district court's ruling requiring the University of Texas to procure and pay for a qualified interpreter for a deaf student under the provisions of Section 504 of the Rehabilitation Act of 1973. In doing so, the court distinguished the Supreme Court decision in *Southeastern Community College v. Davis*, ²³ by pointing out that unlike Davis, a deaf person seeking admission to a nursing program, Camenisch was a fully qualified individual in that he could perform well in his profession in spite of his handicap. All he needed was the education and training that would allow him to continue.

RESIDENTIAL PLACEMENT

Closely associated with the concept of related services is the question of residential placement. The Handicapped Act regulations require that "if placement in a public or private residential program is necessary to provide special education and related services to the handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child." ²⁴

It might appear from this that before a school system would be obligated to pay for all of the costs of a residential placement, three determinations should have to be made: first, that the child is handicapped and therefore entitled to special education and related services; second, that the child is in need of some type of residential placement; and finally, that the special education and related services cannot be provided without the residential placement.

Instead, courts appear to be ordering school districts to provide residential placement if the need for such placement merely arises out of the handicap, as opposed to being necessary for educational purposes.²⁵

In *North v. District of Columbia Board of Education*,²⁶ a severely handicapped sixteen-year-old boy was determined by the school system's placement committee to be in need of a residential placement in order to receive a free appropriate public education. The school system found such a placement after being ordered to do so by a hearing officer.

However, problems developed and the placement became unavailable. The parents requested that the school system provide emergency residential placement until some other appropriate placement was found. The school system refused, contending that plaintiff's problems were emotional, social, and otherwise noneducational and that the school system should not be required to provide living arrangements that were not strictly of an educational nature.²⁷

Possibly because the school system's own placement committee originally recommended the residential placement as being required or possibly because the school system had suggested that neglect proceedings be initiated against the parents if they did not provide for their child, the district court refused to attempt to separate the social, emotional, medical, and educational problems to determine which one required the residential placement. Instead, the court assigned sole responsibility for the residential placement to the school board.²⁸

The *North* decision was cited with approval by the district of Delaware in the case of *Kruelle v. Biggs*.²⁹ The *Kruelle* case, however, differed from *North* in that the school system had never recommended the residential placement, as was originally done in *North*. The school system had developed appropriate services and treatments in the IEP, a fact the parents did not dispute. The parents simply were claiming that their son required a residential placement as part of the IEP. The court stated the issue as "not whether (the current placement) is adequate for what it offers, but whether Paul (Kruelle) requires more continuous care than that available in a six-hour school day in order to learn."³⁰

Although the court appropriately framed the issue in terms of whether or not the residential placement was required in order for the child to

learn, the decision apparently was based upon the testimony of a doctor of osteopathy, who had not testified at the original hearing. This doctor, who was also the child psychiatrist consulted by the parents, had testified that what Paul needed was "an around-the-clock placement with programming by people who know how to do it in order to maximize Paul's chances of learning." ³¹ (Emphasis added.) "Maximizing chances" to learn was a standard ostensibly rejected although actually followed in the *Rowley* case. ³² But the court here ruled that it was "evident that Paul will realize his learning potential only if he receives more professional help than the Meadowwood School's day program can offer him." ³³

It is important to note that sympathy may have played a part in these decisions. For example, in the *Krueille* case, not only did the child have extremely severe emotional and physical problems, but he was also being represented by his parents. ³⁴ This sympathy factor is real and can be difficult to overcome. ³⁵

What happens when the residential placement is ordered and the school system does not have the money to fund the placement? In *Hines v. Pitt County Board of Education*, ³⁶ the court pointed out that state and local school officials had suggested that they could not afford the up to \$1,850.00 per month tuition that might be required to implement a residential placement. But because the state had volunteered to participate in the Handicapped Act program, the court found it had to comply with the requirements. If there was a money shortage, the burden could not be allowed to fall on one single child or group of children, but should be spread equally to all children in the system. ³⁷

DISCIPLINE

One area that generates much interest and concern is the discipline of handicapped students. What should be done with a handicapped student who commits an act of misconduct, which, if committed by a non-handicapped student, would result in expulsion?

In *Doe v. Koger*, ³⁸ an Indiana district court ruled that the Handicapped Act did not prohibit expulsions of handicapped children in general, but rather, "only prohibits the expulsion of handicapped children who are disruptive because of their handicap." ³⁹ The court ruled that the change in placement procedures of the Handicapped Act should be utilized to determine whether or not the handicap is the cause of the child's propensity to disrupt. ⁴⁰ Unfortunately, though, the court did not stop there. Seemingly unknowingly, the court shifted from determining whether or not the handicap is a cause of the misconduct to requiring that a determination be made as to whether the student's misconduct was a result of an inappropriate placement, saying that "when a handicapped

child is involved, expulsion must not be pursued until after it has been determined that the handicapped child has been appropriately placed." 41

In *Stuart v. Nappi* and *S-1 v. Turlington*, federal district courts for Connecticut and Florida, respectively, have ruled that expulsions of handicapped students must be treated as a change in placement and must be accomplished by following the change in placement procedures outlined under the Act and its regulations and keeping in mind the requirement of the least restrictive environment. 42 The Fifth Circuit Court of Appeals has affirmed the district court's ruling in *S-1 v. Turlington*. 43

The *S-1* case involved seven educable mentally retarded children who were expelled from school for separate unrelated acts of misconduct. The acts included threats to teachers and other students, vandalism and sexual misconduct in class. All of these expelled students were afforded the procedural protections required by *Goss v. Lopez*. 44

In only one case did a student raise his handicap as a defense in the expulsion proceedings. 45 Based upon the testimony presented to them, the school board made a determination in the discipline hearing that *S-1* knew and understood the rules, understood the consequences of violating the rules and had handicaps which were not behavioral in nature. They concluded that *S-1*'s handicap of being mentally retarded was not the cause of his misconduct.

In its opinion, the Fifth Circuit pointed out that the district court had refused to determine whether a handicapped student can ever be expelled. 46 The appellate court refused to dodge the question because of the "gray areas" that might result if the question were left unanswered and held that "expulsion is still a proper disciplinary tool under the EHA and Section 504 when proper procedures are utilized and under proper circumstances." 47

What then, are the proper circumstances under which a handicapped child may be expelled? The school district in *S-1* argued that expulsion of a handicapped child would be appropriate where the handicap was not a behavioral handicap or where the child possessed sufficient intelligence to understand rules and comply with them. For example, if a child is seriously emotionally disturbed, then the child's misconduct might very well be a manifestation of the handicap itself. To expel the child under those circumstances would be punishing the child for the child's handicap. Also, it would not be appropriate to expel a child who was profoundly retarded and did not have the ability to understand rules and whose compliance or noncompliance with such rules would be a random occurrence as opposed to an intentional act. 48

On the other hand, if the handicapped child was simply orthopedically impaired, mildly mentally retarded, visually impaired, hearing impaired,

speech impaired or simply had a specific learning disability, then there would be no reason why such a child could not comply with the rules just as any other child. If such a handicapped child committed an act which, if done by a nonhandicapped child, would result in the expulsion of that child, then expulsion would also be appropriate for the handicapped child. The school district argued that the fact of being handicapped does not exempt or immunize the handicapped child from the normal discipline procedures of the school except in the two circumstances already mentioned.⁴⁹

The Fifth Circuit, in rejecting the school district's position, relied in part on the testimony of a clinical psychologist testifying on behalf of plaintiffs. The psychologist had testified at the hearing that:

a connection between the misconduct upon which the expulsions were based and the plaintiff's handicap may have existed . . . a child with a low intellectual function and perhaps the lessening of control would respond to stress or respond to a threat in the only way they feel adequate, which may be verbal aggressive behavior.⁵⁰

The court also noted the psychologist's example of an orthopedically impaired child who would provoke fights notwithstanding the fact that he is likely to lose. She indicated that would be his way of dealing with stress and feelings of physical vulnerability, and in that sense the misconduct was connected to the handicap.⁵¹

Apparently, the proper circumstances where expulsion would be available with respect to a handicapped child would be when it is determined that the student's misconduct does not bear a relationship to his handicapping condition. This determination cannot be made by the school board but must be made by a trained and knowledgeable group of persons.⁵² But it would seem that to rule out expulsion, all the child really needs is a psychologist that will testify that the child may have been frustrated because of the handicapping condition, and that this might have caused him to act inappropriately in a stressful situation.

If a connection is established, then expulsion of a handicapped student would not be appropriate. On the other hand, if there is no connection between the handicapping condition and a given misconduct, then expulsion would be appropriate following the proper procedures. Because the court specifically ruled that expulsion is a change in educational placement, proper procedures would be the change in placement procedures found under the act and its regulations, not the *Goss v.*

Lopez due process procedures for discipline in ordinary situations. In other words, there is a dual discipline system for expulsion depending upon whether the child is handicapped or not. The court said that "unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. This issue must be determined through the change of placement procedures required by the handicapped act." 53

The fact of this dual discipline system is even more readily apparent in light of the Fifth Circuit's final clarifying statement with respect to expulsion of handicapped students. Although the court ruled that expulsion was still a proper disciplinary tool for a handicapped student under proper circumstances and following proper procedures, the court also stated that it could not "authorize the complete cessation of educational services during an expulsion period." 54 A student, through his or her own misconduct, can lose the right to receive educational services, just as a student might lose any other valuable right, including liberty, as a result of misconduct. But the Handicapped Act seems to have created a right that can never be lost. Apparently, the court is saying that a handicapped student can be expelled so long as you do not really expel him.

The effect of this ruling is still unclear. For example, what is a school's responsibility when, for appropriate cause, it decides to expel a student that it has no reason to believe is handicapped, but the student subsequently asserts that the misconduct in question is the result of an undiagnosed handicap? Need the school comply with S-1 or can it follow its normal expulsion process? In Florida, within one week of the Fifth Circuit's decision, a sixteen-year-old eleventh grade student stabbed another student during a fight over a boyfriend on a school bus. The school board had started expulsion procedures when the attorney who had represented S-1 appeared with a copy of the Fifth Circuit opinion. Although the student had never been classified as handicapped, the attorney contended that the student might have an undiagnosed learning disability and if so, it would not be appropriate to expel the student. The school board had no choice but to agree to postpone the expulsion decision pending the outcome of the testing evaluation.

The position taken in S-1 is in agreement with the position suggested by the Department of Education in December of 1980 on what process is due under Section 504 when it becomes necessary to expel a student who is handicapped. 55 The Department's position is that in expelling a handicapped child, a determination must first be made on whether there is a relationship between a student's misconduct and the student's handicap. The Department is presently deciding whether or not to issue a regulation dealing with this subject.

TESTING BIAS

Another area of concern is charges of testing bias. In *Larry P. v. Riles* ⁵⁶ plaintiffs were black students who claimed that the IQ tests used by defendant were biased and that defendant discriminated against blacks by using them. They alleged that the tests resulted in the misplacement of black children in special classes for the educable mentally retarded. ⁵⁷ In reaching its decision, the court accepted expert testimony concerning the discriminatory nature of certain IQ tests.

However, in *Parents in Action on Special Education (PASE) v. Hannon*, ⁵⁸ the court did not want to listen to statistics concerning the impact of the testing, but rather, wanted to review each and every question on the challenged test to determine which ones were in fact discriminatory and how. ⁵⁹ During this process, the court found that many of the attorneys and experts involved had not even read the questions. ⁶⁰ After reviewing all of the questions, they found that only nine of them should not be used because of bias. ⁶¹

The court also rejected plaintiffs' claim that the school district must prove that the tests are not biased, ruling instead that the school system only needs to show that the total process used was free of bias.

YEAR-ROUND SCHOOL

In 1979, the District Court for the Eastern District of Pennsylvania ruled in *Armstrong v. Kline*, ⁶³ that a Pennsylvania blanket prohibition against educational programs for the handicapped extending beyond the normal 180-day school year violated the Handicapped Act. The Court of Appeals for the Third Circuit has upheld the district court's determination, ⁶⁴ although it should be emphasized that this case does not require that all mentally retarded children be provided with year-round school, but simply that there not be a prohibition against it in case an individual child is determined to be in need of such year-round school. On June 22, 1981, the Supreme Court denied a motion for certiorari in the case. ⁶⁵

OUTLOOK FOR THE FUTURE

As handicapped children and their parents become more and more aware of their rights and the possibilities that they have for services under the act and regulations, litigation on the subject is likely to increase. Handicapped litigation will likely become the glamour litigation of the '80s just as race was in the early '60s and sex was during the '70s. It has been said that other legislation, such as

collective bargaining or administrative procedures acts, are lawyers' "relief bills" or a "Full Employment for Lawyers Act"; the Education of the Handicapped Act and its regulations may represent a "Lawyers' Tenure Act."

On the political front, much talk will probably center on block grants coming to the states without strings attached. Though the current administration is seeking to do away with P.L. 94-142,⁶⁶ lobbying efforts by various groups may result in preservation of parts of it.

Finally, if funds are cut back with no relief from the requirements and possibly even if funds are not cut back, there may be a push for states to bail out from under the Act, deciding that it costs more to comply with than the state receives in funds. However, if a state did not have Education of the Handicapped Act funds but still received some federal funds, it would still have to comply with the requirements of Section 504 regulations which, although they essentially require the same thing that P.L. 94-142 regulations require, differ in some aspects, e.g., due process and related services. At the present time, New Mexico is the only state that has not applied for 94-142 funds. However, the state is currently involved in litigation brought under Section 504.⁶⁷ If New Mexico succeeds and comes out of the suit with fewer requirements, then other states might seriously begin considering this option.

FOOTNOTES

- 1 20 U.S.C. §1401, et seq.
- 2 34 C.F.R. §300.13 (1980).
- 3 481 F. Supp. 1224 (N.D. Tex. 1979), rev'd, 625 F.2d 557 (Fifth Cir. 1980).
- 4 481 F. Supp. 1224. Suit was brought under 20 U.S.C. §1415(e)(2).
- 5 *Id.* at 1227.
- 6 *Id.* at 1229. //
- 7 625 F.2d 557.
- 8 *Id.* at 563.
- 9 *Id.* at 563-64.
- 10 46 Fed. Reg. 4912 (1981).
- 11 46 Fed. Reg. 12495; 46 Fed. Reg. 18975.
- 12 46 Fed. Reg. 25614.
- 13 483 F. Supp. 528 (S.D.N.Y. 1980), aff'd, 632 F.2d 945 (2d Cir. 1980). The school district has petitioned the Court for a writ of certiorari.
- 14 632 F.2d 945.
- 15 483 F. Supp. at 534.
- 16 *Id.*
- 17 *Id.*
- 18 *Id.* at 532.
- 19 *Id.* at 535-6.

- 20 632 F.2d at 948.
- 21 Dec. 15, 1980 (Docket #80-1002).
- 22 616 F.2d 127 (Fifth Cir. 1980), vacated and remanded on other grounds, ____ U.S. ____, 101 S. Ct. 1830 (1981).
- 23 442 U.S. 397, 99 S. Ct. 2361 (1979), cited at 616 F.2d at 132.
- 24 34 C.F.R. §300.302.
- 25 See, *North v. District of Columbia Board of Education*, 471 F. Supp. 136 (D.D.C. 1979); *Kruehle v. Biggs*, 489 F. Supp. 169 (D. Del. 1980).
- 26 471 F. Supp. 136.
- 27 *Id.* at 140.
- 28 *Id.* at 142.
- 29 489 F. Supp. at 173.
- 30 *Id.* at 172.
- 31 *Id.* at 173.
- 32 See notes 15-19, *supra*.
- 33 489 F. Supp. at 173-74.
- 34 Paul had been described as a profoundly retarded child whose physical development was further complicated by cerebral palsy. At age 12, he could not walk, dress himself, or eat unaided . . . was not toilet trained . . . did not speak, and his receptive communication level was extremely low. In addition to his physical problems, he had a history of emotional problems which resulted in choking and self-induced vomiting when experiencing stress.
- 35 For example, in *North*, the court felt it would not serve the child's best interests to institute neglect proceedings against his parents, who refused to accept him after he was discharged from his original placement. 471 F. Supp. at 138, 140.
- 36 497 F. Supp. 403 (E.D.N.C. 1980).

- 37 *Id.* at 408. See also *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866, 876 (D.D.C. 1972).
- 38 480 F. Supp. 225 (N.D. Ind. 1979).
- 39 *Id.* at 229.
- 40 *Id.*
- 41 *Id.*
- 42 See, *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978) and *S-1 v. Turlington*, 3 EHLR 551: 211 (S.D. Fla. 1979), *aff'd*, 635 F.2d 342 (5th Cir. 1981), *petition for certiorari* filed April 22, 1981, Docket No. 80-1770.
- 43 635 F.2d 342 (Fifth Cir. 1981).
- 44 419 U.S. 565, 95 S. Ct. 729 (1975), cited at 635 F.2d at 344.
- 45 *Id.* at 344. Except for S-1, the students were not given, nor did they request, hearings to determine whether their misconduct was a manifestation of their handicap.
- 46 *Id.* at 348.
- 47 *Id.*
- 48 *Id.* at 346.
- 49 *Id.*
- 50 *Id.* at 347.
- 51 *Id.*
- 52 *Id.* at 350.
- 53 *Id.* at 348, citing *Doe v. Krueger*, 480 F. Supp. at 229.
- 54 *Id.* at 348.
- 55 45 Fed. Reg. 85082, 85083

- 56 495 F. Supp. 926 (N.D. Cal. 1979).
- 57 *Id.* at 931.
- 58 506 F. Supp. 831 (N.D. Ill. 1980).
- 59 *Id.* at 837.
- 60 *Id.*
- 61 *Id.* at 875.
- 62 *Id.* at 880.
- 63 476 F. Supp. 583 (E.D. Pa. 1979). *aff'd*, 629 F.2d 269 (3d Cir. 1980).
- 64 629 F.2d 269.
- 65 49 U.S.L.W. 3949
- 66 S.1103, introduced by Sen. Hatch on May 4, 1981 and H.R. 3645, introduced by Representative Erlenborn on May 20, 1981.
- 67 *New Mexico Association for Retarded Citizens v. New Mexico*, 495 F. Supp. 391 (D.N.M. 1980), appeal filed by the state August 15, 1980 (10th Cir.) (No. 80-1876).

DUE PROCESS CONSIDERATIONS
UNDER §504 AND P.L. 94-142

By: Michael J. Julka

Attorneys who have been called upon by school district personnel for counsel concerning the education of the handicapped are well aware that §504 of the Rehabilitation Act of 1973,¹ the Education for All Handicapped Children Act of 1975 (hereafter P.L. 94-142 or the Act),² and their implementing regulations³ contain substantial due process safeguards. Congress regarded these safeguards as mandated by the United States Constitution and necessary to protect handicapped children against the possibilities of discriminatory treatment, abusive classification, and inappropriate educational services.⁴

Our lawmakers in Washington, D.C., were guided in their efforts to develop this legislation by two landmark federal district court cases arising in the early 1970s which, as a matter of constitutional law, laid the foundation for procedural due process protection for handicapped children.⁵ Therefore, before discussing the due process considerations under §504 and the Act, a short review of these cases is in order.

CONSTITUTIONAL FOUNDATIONS

The fifth and fourteenth amendments to the United States Constitution prohibit federal and state governments from depriving any person of liberty or property without due process of law. It is this basic tenet of individual rights, along with the equal protection clause, upon which the plaintiffs in *Pennsylvania Association of Retarded Children (PARC) v. Pennsylvania*⁶ and *Mills v. Board of Education*⁷ based their respective actions in their attempts to secure equal educational opportunities for handicapped children approximately a decade ago.

PARC was brought in 1971 as a class action. The plaintiff class consisted of all retarded children under the age of twenty-one whom the state had excluded from school pursuant to state statutes which allowed the exclusion of all children found to be "uneducable." In addition to an equal protection claim, the plaintiffs alleged a denial of due process of law resulting from the "stigma" attached to children labeled "mentally retarded" and excluded from school. Under Pennsylvania statute, this exclusion could be carried out by school district employees without notice to, or an opportunity to be heard from, the parents of the handicapped child.

Relying on the United States Supreme Court decision in *Wisconsin v. Constantineau*,⁸ the federal district court sustained a consent agreement entered into by the parties. That agreement granted handicapped children and

their parents the right to prior notice and an opportunity for a full adversary hearing before any change in, or refusal to change, a child's educational classification.

The liberty interests of handicapped children to an education were also recognized in *Mills*. In granting summary judgment for the plaintiffs (seven children excluded from public schools in the District of Columbia), the federal district court held that prior to a child's being assigned, suspended, or expelled from regular or specialized instruction, due process of law required that notice, hearing rights, and periodic review be provided.

The court's judgment and decree⁹ is very specific in detailing the necessary procedural due process requirements which the school district must follow in dealing with its handicapped children. According to the court, any child that the school district or parent thinks is in need of special education may not be placed in, transferred from or to, or denied placement in such program unless, prior to taking such action, the school district provides the parent or guardian of the child with notice by registered mail of

1. The proposed action in detail, the reasons therefore (including the specifications of any test or reports upon which such action was based), and any alternative educational opportunities available to the student;
2. The parent's right to a hearing before an independent hearing officer if objection is made to the proposed action;
3. The parent's right to obtain, free of charge, an independent medical, psychological and educational evaluation of the child;
4. The parent's right to be represented at the hearing by counsel and to present evidence on the child's behalf; and
5. The parent's right to cross examine witnesses and to have access to all official school records pertaining to the child before the hearing takes place.

The court also determined that the school district must schedule the hearing at a time and place reasonably convenient to the parent, but in no event sooner than twenty days or later than forty-five days after receiving the parent's request for the hearing. Further, at the hearing, the school district carries the burden of proof as to all facts and as to the appropriateness of the placement, transfer, or denial of placement.

The court further provided that the independent hearing officer may not be an employee or agent of the school district, and that the hearing officer must render a decision in writing within thirty days after the hearing. Pending a determination by the hearing examiner, the school district could take no action regarding the child if the child's parents objected. A tape recording or other record of the hearing was to be made available to the parent upon request. Finally, the parents could appeal the hearing officer's decision.

The federal district court retained jurisdiction over the implementation, modification and enforcement of the 1972 judgment and decree rendered in *Mills* and recently found the defendants in contempt for willfully and deliberately failing to comply with the court's prior orders. Cited by the court was the defendant's refusal to meet the time limits set for handling administrative complaints and for recommending appropriate placements, as well as defendant's failure to establish procedures for administrative hearings for children committed to the Department of Human Services.¹⁰

In reaching its decision, the court rejected outright the suggestion of defendants that intervening federal legislation--namely §504 and the Act--preempted the court's jurisdiction and required the plaintiffs to avail themselves of the due process remedies available under such statutes before resorting to court action. Although not ruling on the question of possible sanctions to be imposed pending further hearings, the court ordered the defendants to take immediate action to comply with the court's prior decrees.

PARC and *Mills* represent two courts' interpretations of the due process safeguards constitutionally mandated for the benefit of handicapped students and their parents. However, it will become apparent when we discuss the procedural concepts embodied in §504, P.L. 94-142, and their implementing regulations, that Congress and its enforcing agencies relied extensively upon the *PARC* and *Mills* decisions in formulating the present complement of statutory and regulatory protections.

CONGRESSIONAL RESPONSE

In 1972, shortly after the *PARC* and *Mills* decisions and the public debate they generated, Congress responded with the first civil rights legislation for handicapped individuals by enacting §504.¹¹ As a result, school district programs or activities receiving federal financial assistance were prohibited from discriminating against any individual, including students, on the basis of a handicap. However, §504 is silent as to what, if any, due process procedures are required prior to a decision by school district personnel concerning educating handicapped students.

By 1975 many state and local educational agencies were having difficulty meeting the needs of handicapped students due primarily to the increased cost

of providing their education. Congress responded by enacting P.L. 94-142 which provides for federal funding of the excess cost of educating the handicapped.¹² In order to obtain financial assistance, a strict set of conditions must be met. One of the "eligibility requirements" under the Act requires the state receiving the funds to establish a plan which incorporates and conforms to the extensive procedural safeguards which Congress expressly provided in its legislation.¹³ New Mexico is currently the only state which has elected not to receive such funding.

Subsequently, the implementing regulations for §504 were promulgated. They provide in part that

a recipient that operates a public elementary or secondary educational program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placements of persons who, because of handicap, need or are believed to need special education or related services, a system of procedural safeguards that include notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.¹⁴

In addition, §504 regulations provide that complying with the procedural safeguards embodied in the Act is one means of meeting the procedural due process requirements of §504. Accordingly, the Office for Civil Rights (OCR), the §504 enforcement agency, has taken the position that it will coordinate the procedural due process safeguards under §504 with those embodied in P.L. 94-142.¹⁵ However, while in general the purpose and due process procedural requirements under each statute may be the same, their scope of coverage differs.¹⁶

PROCEDURAL PROTECTIONS

The preponderance of due process considerations arising under §504 and the Act involve one or more of the following basic concepts: (1) notice; (2) consent; (3) hearings; and (4) appeals.

Notice

The Act and its implementing regulations require prior written notice to the parents or guardian of a handicapped child whenever a school district¹⁷ proposes or refuses to initiate or change the child's identification,

evaluation, educational placement, or the provision of a free appropriate public education to the child.¹⁸

The notice must contain: (1) a full explanation of all the procedural safeguards provided in the law; (2) a description of the action proposed or refused and why the district proposes or refuses to take such action; (3) a description of the options considered by the district and why they were rejected; (4) a description of each evaluation procedure, test, record or report used as a basis for the proposed or refused action; and (5) any other relevant factors.¹⁹

Also, the notice must be transmitted in the native language of the parent, and the school district must take steps to ensure that the parent understands the contents of the notice.²⁰ Written evidence of compliance with these requirements must be kept on file by the school district.²¹

The Bureau of Education for the Handicapped (BEH), the predecessor to the present Office of Special Education (OSE), clarified the Act's "prior written notice" requirements in several respects in a recent policy letter.²² According to BEH,²³ it is not necessary for a preplacement evaluation notice to parents to list the specific tests that will be used by the district in carrying out the evaluation. A school district wishing to conduct a preplacement evaluation should provide parents with a summary of any teacher records or reports, as well as previously administered group or individual tests, upon which the district is relying to evaluate the child. On the other hand, according to the policy letter, written notice to parents prior to initial placement of an identified handicapped child must include a description of the actual tests used as a basis for the proposed placement.

Likewise, there are instances when specific tests and other information must be described by a school district in its prior written notice to parents regarding reevaluation of a handicapped child. According to BEH, if the purpose of the notice is simply to meet the statutory three-year reevaluation requirement, the district need not list the specific tests in the notice. However, if reevaluation is requested by a teacher or other staff member, the notice should include a description of any tests, records, or reports forming the basis of the teacher's or staff member's reevaluation request.

Further, BEH's policy letter provides that if the parents request reevaluation, the notice to them should reflect this fact and no tests or other information need be listed. However, should the district refuse the parents' requested reevaluation, the written notice by the district to the parents should provide reasons for the refusal and describe any tests, records or reports upon which the refusal is based.

Several cases have addressed the importance of providing prior written notice to a handicapped child's parents whenever required by the federal statutes. One of the earliest was *Hairston v. Drosick*²⁴ in which a

federal district court held that a school district's exclusion of a spina bifida child without prior written notice to the parents and an opportunity for them to be heard violated §504 and the fourteenth amendment to the United States Constitution.

OCR has interpreted §504 to require that parents must be provided with prior written notice of the procedural safeguards regardless of whether the parents actually attend the child's IEP (individualized education program) meeting.²⁵ Moreover, OSE has determined that a discussion between school district staff and parents of these safeguards is not a valid substitute for written notification--parents may not waive their right to written notice.²⁶ This duty to notify parents lies with the school district and is not the responsibility of the IEP team.²⁷

School districts seeking to avoid accountability for failing to give the required prior written notice must determine when such notice needs to be given. As pointed out above, prior written notice must be given whenever the district proposes or refuses to initiate or change a handicapped child's identification, evaluation, educational placement, or the provision of a free appropriate public education to the child. Unfortunately, the terms "identification" and "educational placement" are not defined by the statutes or regulations.

The term "identification" probably refers to a situation in which a school district, pursuant to its evaluation procedure, seeks to identify children with handicaps. But the circumstances under which a change in "educational placement" has taken place, thereby triggering prior written notice requirements, remain the subject of substantial litigation. A change in location of the child's educational setting may or may not constitute a change in educational placement depending upon the change of location's effect on the program and services being provided the handicapped child.²⁸ Termination of day care services to handicapped children²⁹ and long term suspensions or expulsions of such children³⁰ have been determined to constitute changes in educational placement. However, a two-day transportation suspension was determined not to constitute such a change.³¹ Other instances in which a change in educational placement occurred and notice was required include: (1) transferring children from one school district to another district to attend a relocated special education program;³² (2) not placing a handicapped child in the school closest to the parents' residence;³³ and (3) retaining handicapped students in their present grade for another school year.³⁴

The regulations provide some guidance as to the meaning of the terms "evaluation" and "free appropriate public education." "Evaluation" is defined to mean those procedures used to determine whether a child is handicapped and the nature and extent to which the child needs special education and related services.³⁵ In other words, the term means procedures used selectively with an individual child, but does not include basic tests or other evaluations administered to all children in a school, grade or class.

"Free appropriate public education" refers to the special education and related services which a school district provides at public expense in accordance with the requirements of state and federal education of the handicapped laws.³⁶

Consent

Securing parental consent prior to conducting preplacement evaluation of any student or initial placement of an identified handicapped student is an integral safeguard mandated by the regulations promulgated under the Act.³⁷ Interestingly, while the statute itself does not require such parental consent, the regulations are quite specific as to the applicability of the consent requirements. Therefore, changes in a child's special education program after the initial placement are not subject to parental consent, but are subject to the prior written notice requirement.³⁸

Consent is defined in P.L. 94-142's regulations to mean that the parent has been fully informed, in his or her native language or other mode of communication, of all information relevant to the activity for which consent is sought and agrees in writing to the carrying out of the activity for which the consent is sought; that the consent describes the activity and lists the records (if any) which will be released and to whom; and that the parent understands that the granting of consent is voluntary and may be revoked at any time.³⁹

The policy letter discussed above which deals extensively with the prior notice requirements also discusses consent. BEH takes the position that in order for consent to conduct a preplacement evaluation to be valid, a school district must inform parents about the tests it will use in evaluating the child.⁴⁰ However, as is often the case, if the district is unaware of the actual tests which may be administered to the child, BEH will require the district to, at a minimum, describe the general kinds of tests which may be used and what the tests are designed to measure.

Similarly, the policy letter states that in order to fully inform parents of all information relevant to the activity for which consent for initial placement is sought, a school district should provide information regarding the actual tests used in the evaluation, the results of the evaluation, and should describe the proposed special educational placement designed for the child.

According to BEH, the most effective way to insure that the informed consent requirement is met is to have school district personnel meet personally with the parents involved. However, BEH recognizes written consent obtained through correspondence with the parents.⁴¹ BEH has suggested that a combined prior notice and consent statement may be used by school districts as long as it contains all of the information required for prior notice and meets the requirements of consent as defined in the regulations.⁴²

The concept of mass consent has also received some approval from BEH.⁴³ A school district in Georgia, which was experiencing major delays in receiving written permission after children were referred for evaluation and assessment during the school year, sought permission to obtain, on a voluntary basis, written permission from parents at the time of student registration. In upholding this procedure, BEH stressed that the parents must be fully informed of all of their rights under the Act before consent is given. In addition, BEH pointed out that, prior to any preplacement evaluation actually taking place, the parent was entitled to prior written notice of the proposed evaluation and an opportunity to revoke any earlier consent which may have been given.

Another procedural consideration for school districts involves parents who refuse to give the consent necessary to allow the district to conduct a preplacement evaluation of their child, or an initial placement of an identified handicapped child. Some guidance is found in the Act's regulations which provide that if state law requires parental consent before a handicapped child is evaluated or initially provided with special education and related services, state procedures govern the overriding of a parent's refusal to consent. Where there is no state law requiring consent, a school district may use the due process hearing procedures set forth in the regulations to determine if the child may be evaluated or initially provided special education services without parental consent.⁴⁴ If the hearing officer sustains the school district's decision regarding evaluation or initial placement of the child, the child may be evaluated or placed without the parents' consent, subject to the parents' right to appeal the decision.⁴⁵

On the other hand, the regulations are silent as to what is proper procedure in a situation like that existing in Wisconsin, where state law provides that parental consent must be obtained prior to the preplacement evaluation of a student or initial placement of a handicapped child. Under the above mentioned regulation, the school district would be required to look to state remedies to override a denial of parental consent. However, the state statutes and administrative regulations governing education of the handicapped do not address the procedures to override a parent's refusal to consent. While it is possible that a school district may seek a court order appointing a guardian for the child empowered to provide the necessary consent, such an order may be difficult to obtain.

The frustration that the lack of parental consent may create in a school district is evident in a case involving the Palmyra-Eagle School District in Wisconsin.⁴⁶ In that case, a 10th-grade student was suspected of having exceptional educational needs, based on his disruptive and disobedient conduct. However, the parents of the child repeatedly refused to give the school district permission to evaluate the student, despite the school district's efforts to convince the parents of the need for such evaluation. The board of education subsequently expelled the student pursuant to a state statute, and the student appealed to the superintendent of public instruction.

The superintendent found that one reason the student was expelled was his parents' refusal to consent to an evaluation of his suspected exceptional educational needs and reversed the expulsion as inappropriate and unlawful. Without enumeration, the superintendent stated that the school board had other legal options available to deal with denial of parental consent. On appeal to a county circuit court, the superintendent's decision was sustained.⁴⁷

A recent BEH interpretation provides further guidance to school districts in such situations. According to BEH, when state law requires parental consent but does not provide procedures for overriding denial of consent, a school district may use the due process hearing procedures discussed in the regulations to attempt to override the denial.⁴⁸

In a recently adopted administrative policy developed to ensure Wisconsin's compliance with the Act and its regulations, the Wisconsin Department of Public Instruction adopted BEH's view that where state law requires parental consent but is silent regarding procedures to override such consent, a school district may nevertheless request a due process hearing before an impartial hearing officer to seek authorization for an evaluation or placement of the child.⁴⁹

However, California's SEA has ruled that because state law makes parental consent a prerequisite for special education placement but does not provide the means to override a parent's refusal to consent to such placement, the district's only obligation if parents refuse placement is to provide the child with a regular educational program.⁵⁰

New York's SEA has determined that since state law does not require parental consent prior to placement, a district is not compelled to request a hearing to review its placement decision if parents do not consent to the placement.⁵¹ According to the SEA, New York law does not direct a school board to request such a hearing, nor do the Act's regulations compel the district to take such action. Instead, the SEA stated that the school district should place the child and seek his attendance under the state's compulsory attendance law.

Opportunity to be Heard

Meetings

School districts must develop and implement an IEP to meet the individual needs of each identified handicapped student.⁵² This IEP must be developed, reviewed, or revised at "meetings" conducted by the school district,⁵³ and it is the responsibility of the school district to ensure that the following persons are present at such a meeting: (1) a representative of the school district, other than the child's teacher, who is qualified to provide or supervise the provision of special education to the student; (2) the child's

teacher; (3) one or both of the child's parents; (4) the child, where appropriate; and (5) other individuals at the discretion of the parent or district.⁵⁴

In addition, when a handicapped child is being evaluated for the first time, the school district must also ensure that a member of the evaluation team participates in the meeting.⁵⁵ If this is not possible, some other representative of the district who is knowledgeable about the evaluation procedures used and with the results of the evaluation must be present.⁵⁶

A meeting must be held for any student suspected of needing special education or related services within 30 days of this determination.⁵⁷ Once an appropriate IEP has been developed, the school district must review the IEP at least once a year, and more frequently if appropriate.⁵⁸

Two of the most important aspects of a meeting are parent presence and participation. Accordingly, a school district is required to take exceptional steps to ensure that the child's parents are notified and understand the importance of the upcoming proceeding. For example, the steps that a school district may have to take to ensure that one or both of the parents of a handicapped child are present at each meeting and are afforded the opportunity to participate include: (1) notifying the parent of the meeting and scheduling the meeting at a time and place agreeable to the parents; and (2) indicating to the parents the purpose, time, and location of the meeting and who will attend.⁵⁹

In the event that neither parent is able to attend but would like to participate in the meeting, the school district is required to use other methods to ensure their participation, including individual or conference telephone calls.⁶⁰

A meeting may be conducted without a parent in attendance only if the school district is unable to convince the parents that they should attend. Furthermore, the school district must have a record of its attempts to arrange a mutually agreed upon time and place, including detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any response received; and detailed records of visits made to the parents' home or place of employment and the results of those visits.⁶¹

Finally, if the parents choose to attend the meeting, the school district must take whatever action is necessary to ensure that they understand the proceeding, including providing an interpreter for parents who are deaf or whose native language is other than English.⁶²

On January 19, 1981, OSE published an interpretation of the IEP requirements under the Act.⁶³ Consisting of 60 questions and answers, the document is considered by OSE to be legally binding on school districts, and

it will be used by OSE in providing advice and determining compliance with the Act and its regulations. It includes the following interpretations:

1. A school district has the discretion to combine a student's evaluation and IEP meetings as long as parents participate in the combined meeting.
2. While IEPs must be reviewed at least annually at a meeting, such review need not be conducted at the beginning of each school year; rather, meetings may be held any time during the school year or over summer vacations.
3. There is no prescribed length for IEP meetings. Generally the only requirement is that a school district allow sufficient time to ensure meaningful parent participation.
4. IEP meetings may be taperecorded at the option of either the child's parents or the school district. If the recording is made and maintained by the district, it is an "educational record" under the Family Educational Rights and Privacy Act⁶⁴ and is subject to the confidentiality requirements of the regulations under said Act,⁶⁵ as well as those under P.L. 94-142.⁶⁶
5. The representative of the school district, other than the child's teacher, who is required to attend the IEP meeting should have the authority to commit school district resources for the provision of specific educational and related services to the child.
6. Determining which of the child's teachers will attend an IEP meeting will depend on the circumstances presented. For example, a child considered for initial placement could have either his/her regular teacher or special education teacher in the area of the child's suspected disability present. Nothing would prevent both teachers from attending the meeting. When a child is enrolled in both special and regular educational classes, it is preferable that the child's special education teacher attend the meeting.
7. It would be inappropriate for officials of teacher organizations to attend IEP meetings. Such attendance is not provided for under P.L. 94-142 and, unless

prior written permission is received from the child's parents, may violate the Family Educational Rights and Privacy Act⁶⁷ if personally identifiable information from the student's record is discussed.

8. It is up to the child's parents to determine if the child should attend his or her IEP meeting. OSE does suggest, however, that a district encourage parents to involve older handicapped children in their IEP meetings.
9. In addition to the district's obligation to inform parents of who will be in attendance at the IEP meeting, the district should also inform the parents of their right to bring other participants to the meeting, such as a friend, neighbor, or person familiar with the applicable laws or the child's needs. It is appropriate for the district to ask parents whether the parents intend to bring additional participants.
10. Parents are to be considered equal participants with school personnel in developing, reviewing or revising the child's IEP, and it is inappropriate for a school district to present a complete IEP to the parents at the time the IEP meeting is commenced.

While the procedures for conducting the meeting appear to be left to the discretion of the school district, many school districts are surprised when a child's parents are represented at the meeting by an attorney or other child/parent advocate. Representation of the child/parent often turns the meeting into an adversarial setting and hinders development of the IEP. In some instances, however, a child/parent representative merely observes and records the proceeding in order to establish a foundation to overturn an unsatisfactory placement at an appeal hearing.

Hearings

After being informed by written notice of a school district's proposal or refusal to initiate or change any aspect of a child's identification, evaluation, educational placement, or provision of a free appropriate public education, the child's parents must be given the opportunity to complain to the district. If the parents file a complaint, they are entitled to an impartial due process hearing.⁶⁸

The Fifth Circuit Court of Appeals recently ruled that, if requested, the entitlement to a due process hearing extends to handicapped students who

voluntarily withdraw from school and to students who, through their parents or guardian, previously agreed to an educational placement.⁶⁹ Moreover, according to the court, a "mediation" conference offered to parents by a school official does not comply with the requirement that parents be afforded an impartial hearing regarding complaints.

Also, OSE has interpreted the Act and its regulations to require a due process hearing as the proper remedy to resolve disputes between parents and a district over the destruction of personally identifiable information held by the district about a handicapped child.⁷⁰

In addition, the child involved must remain in his or her present educational placement throughout all administrative or judicial proceedings, unless the parents and school district agree otherwise.⁷¹ However, where the child's initial admission to public school is in question, the child, with the consent of the parents, must be placed in the public school program until the completion of all proceedings.⁷² This inability to change a child's placement during a complaint proceeding does not preclude a school district from using its "normal procedures" for dealing with children who are endangering themselves or others.⁷³

After receiving a complaint, a school district may not reject the complaint and refuse to hold a hearing if the complaint results from a disagreement with the parents and concerns any matter regarding the child's identification, evaluation, educational placement, or the provision of a free appropriate public education.⁷⁴ In fact, even if a school district has received an opinion from BEH concerning the very subject upon which a hearing is requested by a parent, the district may not rely on that opinion to override or deny a properly made request for a due process hearing.⁷⁵

The school district directly responsible for the education of the child must conduct the hearing at its expense.⁷⁶ An impartial hearing officer must be selected to receive evidence and render a decision. The Act's regulations provide that the hearing may not be conducted by a person who is an employee of the school district involved in the education or care of the child, or by any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.⁷⁷

Similarly, in Policy Interpretation No. 6,⁷⁸ OCR ruled that §504 prohibits school board members from serving as hearing officers in proceedings conducted to resolve disputes between parents of handicapped children and their own school district. Not only did OCR believe that school board members would have an improper financial interest in the outcome of the hearing since an adverse decision to the parents might avoid additional expenditures by the school board, OCR also opined that its commitment to coordinate the §504 procedural safeguards with those established by BEH under the Act requires this interpretation.

On the other hand, both OCR and BEH have determined that state educational agency employees, including a state superintendent or commissioner of education, may serve as impartial hearing officers provided: (1) the state agency is not directly responsible for supplying the special education or related services to the handicapped child in question; and (2) the state hearing officer makes a case-by-case determination to ensure his/her overall impartiality.⁷⁹ But despite OSE's and OCR's apparent acceptance that SEA employees may, in appropriate circumstances, serve as impartial hearing officers, courts facing this issue continue to disagree. In *Robert M. v. Benton*,⁸⁰ the Eighth Circuit Court of Appeals relied upon the Act's legislative history in holding that SEA employees, including a state superintendent, are prohibited from serving as impartial hearing officers even if such employees are only indirectly involved in the education of the handicapped child.⁸¹

Due to the controversy, the Department of Education is contemplating developing policy interpretations or regulations regarding the propriety of using state employees, state superintendents or local educational agency officials serving other districts in the state as hearing officers.⁸²

A troublesome result of interpreting §504 and the Act as prohibiting school board members from acting as hearing officers is the resulting conflict with some state laws. For example, Missouri statutes allow the school board to render the final due process hearing decision, thereby treating a hearing examiner's decision as only a recommendation to the board of education. Based on the regulations promulgated under §504, and in accordance with Policy Interpretation No. 6, OCR ruled that such a procedure is illegal. Therefore, OCR ordered the school board to treat the hearing examiner's decision as final unless a proper appeal by the parent or school district was undertaken.⁸³

Similarly, state laws in Kansas, Georgia, and Wisconsin, *inter alia*, provide that if the parents of a handicapped child are dissatisfied with the decision rendered by a hearing officer, they may appeal to the local board of education. Despite the fact that in each state a local school board's decision may be appealed under state law to the state educational agency, OCR has determined that this procedure violates §504's regulations and Policy Interpretation No. 6, while BEH has ruled that a board of education's only powers in such instances are to decide to implement the hearing decision or appeal the decision.⁸⁴ Finally, at least one state supreme court has held, that the federal regulations override conflicting state provisions.⁸⁵

School districts may sometimes face competing directives from separated or divorced parents of a handicapped child. In an attempt to give guidance in this regard, OCR has interpreted §504 to provide that where state law makes educational decisions the sole province of the custodial parent, such parent has the sole right to make the final decision as to the child's educational placement and to request a due process hearing.⁸⁶ However, OCR takes the position that the noncustodial parent may have access to the child's records,

teachers and school officials, and may attend meetings and hearings relating to the development and modification of the child's IEP.

When a due process hearing is necessary, it must be held at a time and place mutually agreeable to all the parties. At the hearing, all parties have the right to be accompanied and advised by counsel, or by individuals with special knowledge or training regarding handicapped children.⁸⁷ Moreover, school boards should be aware that whenever they or the parent initiate a due process hearing, the parents must be provided with information of any free or low cost legal or other relevant service which may be available.⁸⁸

The parents' right to be accompanied and advised by individuals with special knowledge or training regarding the problems of handicapped children has been the subject of dispute in several states. While OSE maintains that parents may be represented by nonattorney advocates, even at the state administrative review level, the issue of whether such representation might be prevented by conflicting state laws, such as those prohibiting the practice of law without a license, remains unresolved.⁸⁹

Any party to a hearing has the right to present evidence and confront, cross examine, and compel the attendance of witnesses.⁹⁰ The hearing examiner is to hear all the relevant evidence which any party wishes to present.⁹¹ Parties may use any method which is established as acceptable practice in the state in which the hearing is initiated, including subpoenas, to compel the attendance of witnesses, and it is left to state statutes to determine whether witnesses must be under oath while testifying.⁹²

To eliminate surprises at the hearing, the Act contains its own "discovery" procedures. First, any party may prohibit the introduction of evidence at the hearing which was not disclosed to that party at least five days before the hearing.⁹³ Second, the parents of a handicapped child must be given an opportunity to examine all relevant records concerning the child's identification, evaluation, educational placement or access to a free appropriate public education.⁹⁴ Third, the parents of a handicapped child must be given the opportunity to obtain an independent evaluation of the child at public expense.⁹⁵

The prohibition against introducing at the hearing any evidence which was not disclosed to a party at least five days before the hearing has been tempered by a recent BEH interpretation,⁹⁶ in which BEH opined that it is not necessary to reveal all the evidence that will be used by either party. However, the opinion does not provide sufficient guidance on the parameters of what must be disclosed, except that the names of witnesses to be called and the general thrust of their testimony must be made available.

Parents also have the right to have their child present and to have the hearing open or closed to the public.⁹⁷ As regards the latter right, the New York Commissioner of Education determined that a due process violation did

not occur when, following a parental request for a closed hearing, the president of the school board was allowed to attend.⁹⁸ The record was unclear as to the capacity in which the board president was attending the hearing. However, the Commissioner stated that if the board president attended as a board representative, no violation of the right to a closed hearing occurred. Similarly, if the board president attended in his personal capacity, any violation that occurred did not affect the appropriateness of the recommended placement and did not justify any relief for the parents. This is one of several recent decisions which suggest that a "harmless error" doctrine may be applied in appropriate circumstances.⁹⁹

The scope of the powers and duties of hearing officers has been the subject of many recent decisions. Aside from conducting the hearing, the only specified duty of the hearing officer is to provide written findings of fact and a decision.¹⁰⁰ At least one federal district court has determined that this requirement would be stripped of any meaning if the court were to sanction sketchy findings of fact that were conclusive in nature and which failed to assess the handicapped child's needs, or the capacity of the district's programs to meet those needs.¹⁰¹

In Ohio, a hearing officer has been held to have the authority to adopt procedures for conducting a due process hearing which are at variance with standard trial practice and procedures.¹⁰² The Ohio SEA refused to overturn the hearing officer's placement decision despite the parents' contention that they were prevented from presenting their evidence in the most beneficial and suitable manner because: (1) the officer divided the evidentiary phase of the hearing into three subject matter areas and received both sides' evidence on each issue before proceeding to the next; (2) the hearing officer took an active role in questioning witnesses on matters outside the parties' direct or cross examination; and (3) the hearing officer refused to sequester the witnesses.

However, limitations have been recognized on a hearing officer's authority to determine the specific school, classroom or grade a handicapped child will attend. According to the Pennsylvania SEA, the hearing officer's authority extends only to the "type" of educational program the child needs. The decision of the school, classroom or grade to be attended by the handicapped child remains with the district as long as the district's choice conforms to the program found to be appropriate by the hearing officer.¹⁰³

Following the hearing, a written or electronic record of the proceedings must be provided to each party upon request.¹⁰⁴ A copy of the hearing examiner's written findings of fact and decision must be mailed to each party within 45 days after the request for the hearing is received.¹⁰⁵

The parents right to a written transcript was at issue in *Roe v. Anrig*.¹⁰⁶ A federal district court denied the parents' motion to compel the Massachusetts SEA to promptly provide the parents with a written

transcript of the due process hearing (which had been electronically recorded). According to the court, the school district, rather than the parents, has the absolute right to determine whether to provide a tape recording or written transcript of the hearing and nothing in the Act or its regulations intimate that the district must provide a written transcript of the tape recording at the parent's request.¹⁰⁷ One of the issues upon which the Department of Education solicited comments last year in its notice of intent to develop regulations or policy interpretations was whether school districts should be required to make available to parents, free of charge, hearing transcripts and other records pertaining to the due process hearing.¹⁰⁸

Two very important considerations for counsel preparing to represent a school district in a due process hearing are: (1) who carries the burden of proof, and (2) what substantive standard of proof is required.

Dispute continues over who carries the burden of proof at a due process hearing. In some states, parents have the burden of proving the district's proposed placement is inappropriate.¹⁰⁹ Other decisions take the opposite view, finding that the school district must prove the appropriateness of its placement decisions.¹¹⁰ Finally, at least one jurisdiction requires the school district to present some evidence in support of its placement, and, upon doing so, shifts the burden of proof to the parents to prove the placement is, in fact, inappropriate.¹¹¹

In a recent Wisconsin decision,¹¹² the superintendent of public instruction concluded that a hearing examiner must presume a school district's evaluation and placement is appropriate. This presumption may be rebutted by the parents upon proof by a clear preponderance of the evidence that the educational placement recommended by the school district is not appropriate. As stated by the superintendent:

To suggest that the school district's evaluation and placement decisions are not entitled to such a presumption of correctness is to imply that the professional evaluations conducted under the elaborate requirements of the law are presumptively incorrect. There is nothing in the state or federal law that compels such an illogical conclusion. Considering the expertise of the persons required to conduct the evaluations and make placement decisions, the risk of error appears to be slight and is adequately safeguarded by the opportunity to challenge those conclusions at the hearing.

The Wisconsin Superintendent of Public Instruction's decision is in general accord with the result reached by a federal district court in *Stemple*

v. Board of Education of Prince George's County.¹¹³ In that case, the student challenged the hearing examiner's decision that she carried the burden of persuasion throughout the due process hearing proceedings. In affirming the hearing examiner, the court held that §504 does not require that school authorities have the burden of proof. In view of all of the other extensive due process procedures afforded the plaintiffs at the hearing, the court concluded that allocating the burden of proof to the parents did not deny them the due process guarantee of a "meaningful opportunity to be heard."

The above authorities' conclusions regarding the burden of proof are contrary to that set forth in *Mills*. As mentioned above, the court in *Mills* held that a school district is required as a matter of constitutional due process to carry the burden of proof to sustain the district's evaluation and placement decisions.

On a related issue, the Court of Appeals for the Fourth Circuit in *Stemple*¹¹⁴ interpreted the Act's "status quo" provision¹¹⁵ to require that unless the parent's and school agree otherwise, parents who avail themselves of the Act's hearing or review procedures must maintain their child in his or her current educational placement. While this duty may be generally unenforceable by the state or school district, the court held that a violation of the status quo provision will negate any right of the parents to receive reimbursement for private school tuition.

In denying private school tuition reimbursement for the parents in *Stemple*, the court rejected the parents' contention that the status quo provision was inapplicable because the parents had unilaterally removed their child prior to invoking any hearing or appeal procedures. Rather, the court was of the opinion that the status quo duty arises immediately whenever school authorities make a decision regarding the identification, evaluation or placement of a handicapped child. Moreover, this duty continues until the parents decide not to contest the district's action, or, if there is a contest, until it is resolved.

On the other hand, there have been numerous decisions upholding a parent's right to unilaterally withdraw a child from his or her current educational placement and receive private school reimbursement.¹¹⁶ In such situations, it is significant that the parents' transfer of their child usually was a reaction to some inappropriate action or non-action on the part of the school district.

Finally, considering the extensive due process hearing procedures that must be afforded to handicapped children and their parents in all matters relating to the handicapped child's identification, evaluation, educational placement, or right to a free appropriate public education, school boards may wish to consider mediation as an intervening step prior to conducting formal due process hearings. While not required by §504, P.L. 94-142, or the regulations, school boards may discover mediation resolves differences between

parents and the board without creating an adversarial relationship.¹¹⁷ Of course, school boards are advised not to require mediation or use it to deny or delay a parent's guaranteed due process hearing rights.¹¹⁸

Appeals

State Educational Agency Review

Under federal law, the decision of a hearing examiner is final unless a party to the hearing appeals the decision to the state educational agency (SEA).¹¹⁹ In such cases, the SEA shall conduct an impartial review of the hearing and render an independent decision within 30 days after the request for review is received.¹²⁰ The reviewing officer is directed to examine the entire hearing record to ensure that the procedures used in noticing and conducting the hearing were consistent with all due process requirements.¹²¹

In *Vogel v. School Board of Montrose R-14 School District*¹²² and *Grymes v. State Board of Education*,¹²³ two federal district courts held that the Act's guarantee of an impartial review of the due process hearing decision is violated if an SEA employee serves as the reviewing officer. According to both courts, the legislative history of the Act mandates that, at a minimum, the impartial individual who conducts the review may not be an employee of the SEA or any local or intermediate unit thereof.

In contrast, both OSE and OCR have interpreted their respective statutes to allow SEA employees to conduct the impartial review in most circumstances. In addition, the Department of Education is contemplating issuing policy interpretations or regulations dealing with whether state employees, state superintendents or members of state boards of education may serve as reviewing officials.¹²⁴

The reviewing officer may provide all parties the opportunity for oral or written argument and/or may seek additional evidence by conducting another due process hearing.¹²⁵ The decision whether to hear additional evidence is within the discretion of the reviewing officer. In each instance, the reviewing officer must make a threshold determination as to whether additional evidence is necessary. If no need exists, then denial of an opportunity to the parent to present new or additional evidence at an appeal hearing will not be deemed to be a denial of any rights.¹²⁶

The standard of review to be applied by the SEA reviewing officer to a local hearing officer's decision remains essentially a question of state law. The Minnesota Supreme Court held in *Independent School District No. 277 v. Pautz*¹²⁷ that a hearing examiner's decision is not entitled to a presumption of correctness when reviewed by the SEA since local hearing officers may not have the same technical training, education and experience as the SEA. Therefore, the SEA should evaluate the local hearing officer's determination independently.

On the other hand, the Georgia SEA continues to adhere to the standard that if any evidence supports the hearing officer's determination, that determination will not be disturbed on appeal.¹²⁸

Unfortunately, it appears that no generally accepted standard of review exists. To date, the "preponderance of the evidence test,"¹²⁹ "any evidence test,"¹³⁰ and "competent, material, and substantive evidence test,"¹³¹ have all been utilized by SEAs. Accordingly, district counsel should check state law for provisions governing the review standard.

Court Review

The findings and decision of the reviewing officer are final unless a party to the review proceedings brings a civil action in state court or federal district court.¹³² In such instances, the district court is to receive the records of prior administrative proceedings, is to hear additional evidence at the request of either party, and, basing its decision on the preponderance of the evidence, is to grant such relief as it determines appropriate.¹³³

Federal district courts continue to hold that a *de novo* judicial review of SEA decisions was intended by Congress under P.L. 94-142.¹³⁴ However, in *Pautz*, the Minnesota Supreme Court held that SEA decisions should be afforded a presumption of correctness and that state courts should defer to the SEA's decision unless it is persuasively shown that the SEA violated the Constitution, exceeded its statutory authority or jurisdiction, engaged in unlawful procedures, proceeded on an erroneous theory of law or otherwise acted arbitrarily or capriciously.¹³⁵ A *de novo* review provides an appealing party one last opportunity for a complete evidentiary hearing and an independent decision regarding the education of the handicapped child.

The Act allows appeals from SEA decisions to be taken to either federal or state court. In *Scruggs v. Campbell*,¹³⁶ the parents appealed to federal court, while the school board appealed to state court. Recognizing that Congress did not intend judicial consideration in both federal and state courts, the Fourth Circuit Court of Appeals upheld the lower court's decision to dismiss the parents' federal suit, despite the fact their action was commenced first, since the parents, unlike the school district, were not appealing from the final administrative decision at the SEA level.

On a related issue, BEH has determined that the Act does not provide for an appeal to BEH to review an SEA decision with which the parents disagree; rather, BEH suggested the parents bring a civil action.¹³⁷

Whether court action may be maintained prior to exhausting administrative remedies under §504 and the Act is uncertain. On its face, the Act requires

at least two administrative reviews before a court action may be maintained. Similarly, §504 contemplates enforcement by OCR orders cutting off federal funding to school districts. But the right of parents of a handicapped child to maintain a private individual court action under either the Act and/or §504 prior to exhausting administrative remedies has been the subject of numerous recent court cases.¹³⁸ Although a split of authority exists, the trend at the lower federal court level appears to be to sanction such suits, especially where damages are not at issue.¹³⁹

Finally, a California SEA decision has determined that the parents' failure to comply with the state's money claim statute does not bar their request for private school tuition reimbursement against a school district.¹⁴⁰ According to the SEA, the claims statute would not apply to the due process administrative hearing since the hearing is not conducted in a court of competent jurisdiction. Moreover, the SEA concluded that while the SEA proceeding is reviewable in a court of competent jurisdiction, several reasons exist why noncompliance with the money claims statute should not bar suit.

REMEDIES

Several decisions have suggested appropriate remedies where the procedural protections of §504 and the Act have been violated. Most frequently, a school district is enjoined from committing any further due process violations.¹⁴¹ A school district may also be ordered to create, develop, or enforce an appropriate due process hearing system so that all further complaints may be processed in compliance with §504 and the Act.¹⁴²

Statutory procedural violations that result in a handicapped student being inappropriately placed or excluded from school are generally remedied by reinstatement in an appropriate placement and an order directing expungement of all records reflecting the inappropriate placement or exclusion.¹⁴³

Possibly more threatening, however, are the financial obligations which may be thrust upon a school district committing due process violations. The exposure of school districts to liability has been expanded appreciably in the past year as a result of two decisions by the United States Supreme Court--*Owen v. City of Independence*¹⁴⁴ and *Maine v. Thiboutot*.¹⁴⁵ In *Owen*, the Court held that school boards sued under §1983 of the Civil Rights Act are not entitled to any immunity from liability for damages. In *Thiboutot*, the Court held that §1983 authorizes a person whose rights under a federal statute (such as §504 or P.L. 94-142) have been violated to sue for damages. A successful litigant may be awarded attorney fees under §504 and under the Civil Rights Attorneys Fees Act.¹⁴⁶ In addition, federal funding may be cut off under both §504 and P.L. 94-142.¹⁴⁷ An agency may also be required to provide additional instruction¹⁴⁸ or compensation to a handicapped child improperly excluded from school in an attempt to make up for the child's loss of education or other injuries.¹⁴⁹

"Punitive" remedies have been ordered for violations of the Act by the reviewing officers of the Washington state educational agency.¹⁵⁰ In each instance, the hearing examiner and reviewing officer found that the school districts had denied handicapped children the fundamental procedural protections of P.L. 94-142, resulting in their constructive exclusion from the public schools. According to the reviewing officers, the parents' decisions to remove their children from the public schools and place them in private schools were completely warranted under the circumstances. Consequently, although private school placement was not necessitated by the particular handicap of either student, the reviewing officers affirmed the orders requiring the school districts to reimburse the parents for the private school placements and for transportation costs.

Citing a Texas federal district court case,¹⁵¹ a reviewing officer stated:

At some point the parents have not only a moral obligation but a legal right to take unilateral action. See *Howard v. Friendswood Independent School District*, 454 F. Supp. 634 (S.D. Tex. 1978). The right to an appropriate education has no meaning if it can be lost in a time-consuming process of a district hearing and a further appeal to SPI. An entire school year has been consumed while Eric's cause has been processed through the administrative maze. A punitive remedy upon the district for the denial of a substantive right must be given the same status as denial of a procedural right.¹⁵²

Furthermore, school board members who do not carry out the substantive and procedural protections mandated by the fourteenth amendment to the United States Constitution, §504, and the Act may be held individually liable for violations. In the case of *Howard v. Friendswood Independent School District*,¹⁵³ a federal district court ruled that the school district violated its legal obligation under §504 and the Constitution when it constructively excluded a minimally handicapped student from public school. The court suggested that the time had come to begin imposing individual liability under the doctrine of *Wood v. Strickland*.¹⁵⁴

This court has concluded that the board of trustees of FISD has received extremely poor advice concerning its legal obligations and the possible liability of individual administrators and trustees for intentional violation of plaintiff's constitutional rights. In this action, the attention of the board of trustees is respectfully directed to the possibility of personal liability being imposed upon

school board members for failure to comply with their legal obligation. (emphasis added)

* * *

In July, 1977 there may have been some justification for lack of information concerning the trustees' legal obligation. There is no like justification now.¹⁵⁵ (emphasis in original)

Finally, *Monell v. Department of Social Services*¹⁵⁶ raises the prospect that school districts may be liable for damages for violations of §504 and the Act.

CONCLUSION

Certainly, procedural due process, both from a constitutional and statutory standpoint, has come of age in the education of the handicapped, but many feel that the procedural protections impede educating handicapped children to a greater extent than furthering that goal.

However, an unstated benefit of these procedures may well be the dialogue which will necessarily take place between school district personnel and parents. There is a general consensus that resolution of disputes involving the education of a particular handicapped student through mutual agreement will benefit all--the parents, the school district, and, most of all, the child. As school district legal counsel, it is important to recognize this consensus, while at the same time adequately advise clients as to the thicket of procedures mandated by the Constitution and the federal statutes.

Finally, in the interest of concluding on a positive note, *de minimus* violations of §504 or the Act's procedural safeguards may not automatically result in a successful appeal of a district's decision regarding a handicapped child. Three SEAs have ruled that *de minimus* noncompliance with statutory procedural requirements may be excused if the procedural violations do not effect the handicapped child's education to such a degree as to deny the child a free and appropriate public education, or if the parents have not been significantly prejudiced by the district's violation.¹⁵⁷

FOOTNOTES

- 1 29 U.S.C. §794 (hereinafter §504).
- 2 P.L. 94-142, 20 U.S.C. §1401 *et seq.*
- 3 34 C.F.R. §104 and 34 C.F.R. §300, respectively. Effective November 21, 1980, these regulations were recodified from 45 C.F.R §84 and 45 C.F.R §121a, respectively. A cross reference index may be found at 45 Fed. Reg. 77368 (November 21, 1980).
- 4 *Lora v. Board of Education of City of New York*, 456 F. Supp. 1211, 1227 (E.D.N.Y. 1978)
- 5 Note, *Enforcing the Right to an 'Appropriate Education': The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1105 (1979); and Baugh, "The Federal Legislation on Equal Educational Opportunity for the Handicapped," 15 Idaho L. Rev. 65, 67-71 (1978):
- 6 334 F. Supp 1257 (E.D. Pa. 1971) as modified by 343 F. Supp. 279 (E.D. Pa. 1972).
- 7 348 F. Supp. 866 (D.D.C. 1972).
- 8 400 U.S. 433, 91 S. Ct. 507 (1971). (Prior notice and an opportunity to be heard required before city could stigmatize person by posting notices in all retail establishments forbidding liquor sales to anyone listed in the notice due to their excessive drinking.)
- 9 *Mills v. Board of Education*, 348 F. Supp. 866, 877 (D.D.C. 1979).
- 10 *Mills v. Board of Education*, Civil Action No. 1939-71, 3 EHLR 551:643 (D.D.C. 1980).
- 11 Section 504, 29 U.S.C. §794, provides in part that "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
- 12 34 C.F.R. §300.182.
- 13 20 U.S.C. §1412.
- 14 34 C.F.R. §104.36

- 15 OCR Policy Interpretation No. 6, 43 Fed. Reg. 36036 (1978).
- 16 45 C.F.R. §83.3(j) and comments found at 42 Fed. Reg. 22676, 22686 (1977) wherein §504 is interpreted to apply to drug addicts and alcoholics. P.L. 94-142 provides no such coverage.
- 17 School districts are one of several public agencies which may provide educational services to the handicapped. State educational agencies, local educational agencies, intermediate educational units and any other political subdivisions of the state may be responsible for providing education to handicapped children. 34 C.F.R. §300.11.
- 18 20 U.S.C. §1415(b) (1) (C) and 34 C.F.R. §300.504(a)
- 19 34 C.F.R. §300.505(a) (1-4).
- 20 34 C.F.R. §300.505(b) and (c). Note also that the comment to 34 C.F.R. §300.9 provides that "[i]f the person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).
- 21 34 C.F.R. §300.505(c) (3).
- 22 According to OSE, policy letters have "official" status from a compliance and monitoring standpoint. OSE letter to Robert S. Black, 2 EHLR 211:235 (April 9, 1980).
- 23 BEH letter to Jeffrey P. Grimes, 2 EHLR 211:187 (March 20, 1980).
- 24 423 F. Supp. 180 (S.D. W. Va. 1976).
- 25 OCR letter to Peter Ripley, 2 EHLR 257:99 (March 3, 1980).
- 26 OSE letter to Christopher Cogley, 2 EHLR 211:212 (June 17, 1980). See also OCR letter to Superintendent, Fredericksburg City Public Schools, 2 EHLR 257:205 (January 22, 1981).
- 27 OSE letter to Christopher Cogley, 2 EHLR 211:212 (June 17, 1980).
- 28 OSE letter to John Flores, 2 EHLR 211:233 (August 18, 1980); OCR letter to National Association for the Deaf, 2 EHLR 257:107 (January 22, 1979); and Concerned Parents and Citizens for the Continuing Education at Malcolm X. v. New York City Board of Education, 629 F.2d 751 (2d Cir. 1980), *cert. denied*, ___ U.S. ___, (January 12, 1981).
- 29 M.R. v. Milwaukee Public Schools, Decision No. 80-C-592, 3 EHLR 552:243 (E.D. Wis. 1980).

- 30 OCR letter to David Moberly, 2 EHLR 257:203 (October 16, 1980), and S-1 v. Turlington, 635 F. 2d 342, (5th Cir. 1981), *petition for cert. filed* April 22, 1981, Docket No. 80-1770.
- 31 In the matter of . . . , New York SEA Decision No. 10484, 3 EHLR 502:257 (March 5, 1981).
- 32 Office of Standards, Policy and Research (OSPR) of the Office for Civil Rights, policy memorandum I/1/45, 2 EHLR 259:05 (April 20, 1979); OCR letter to Mr. Jack McConkey, 2 EHLR 257:46 (August 13, 1979).
- 33 34 C.F.R. §300.552(a)(3); BEH letter to Dr. Greg Frith, 2 EHLR 211:84 (October 27, 1978).
- 34 Paul O., Connecticut SEA Decision No. 79-43 , 3 EHLR 501:332 (1979).
- 35 34 C.F.R. §300.500(c).
- 36 20 U.S.C. §1401(18) and 34 C.F.R. §300.4.
- 37 34 C.F.R. §300.504(b).
- 38 Comment to 34 C.F.R. §300.504(b).
- 39 ~~34 C.F.R.~~ §300.500.
- 40 BEH letter to Jeffrey Grimes, 2 EHLR 211:187 (March 20, 1980).
- 41 *Id.*
- 42 *Id.*
- 43 BEH letter to Ms. Betsy Primm, 2 EHLR 211:38 (June 30, 1978).
- 44 34 C.F.R. §300.504(c)(1) and (2)(i).
- 45 34 C.F.R. §300.504(2)(ii).
- 46 Wisconsin SEA Decision (March 17, 1978).
- 47 Palmyra-Eagle School District v. Thompson, Dane Co. Cir. Ct. Case No. 6722 (Wisc. 1978).
- 48 BEH letter to Mr. Fred Weintraub, 2 EHLR 211:90 (May 3, 1979).
- 49 Wisconsin Department of Public Instruction Bulletin No. 80-6 (September 24, 1980).

- 50 In re: The Riverside Unified School District, California SEA Decision
No. SH-255, 3 EHLR 502:222 (December 16, 1980).
- 51 In the Matter of . . . , New York SEA Decision No. 10239, 3 EHLR 502:116
(April 3, 1980).
- 52 20 U.S.C. §1401(19) and 34 C.F.R. §300.340.
- 53 34 C.F.R. §300.343.
- 54 *Id.* at §300.344(a).
- 55 *Id.* at §300.344(b) (1).
- 56 *Id.* at §300.344(b) (2).
- 57 *Id.* at §300.343(c).
- 58 *Id.* at §300.343(d).
- 59 *Id.* at §300.345(a) and (b).
- 60 *Id.* at §300.345(c).
- 61 *Id.* at §300.345(d).
- 62 *Id.* at §300.345(e).
- 63 46 Fed. Reg. 5460 (January 19, 1981).
- 64 20 U.S.C. §1232g.
- 65 34 C.F.R. §99.
- 66 34 C.F.R. §300.560 to .565.
- 67 20 U.S.C. §1232g.
- 68 20 U.S.C. §1415(b) (2) and 34 C.F.R. §300.506.
- 69 *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981).
- 70 OSE letter to Benson R. Herbert, 2 EHLR 211:229 (July 10, 1980).
- 71 34 C.F.R. §300.513(a).
- 72 *Id.* at §300.513(b).

- 73 Comment to 34 C.F.R. §300.513. However, substantial disagreement has evolved concerning which are "normal procedures" when children endanger themselves or others. See *Doe v. Kroger*, 480 F. Supp. 225 (N.D. Ind. 1979), *Southeast Warren Community School District v. Department of Public Instruction*, 285 N.W. 2d 173 (1979); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978); and OCR letter to Mr. Frank McKenzie, 2 EHLR 257:25 (October 18, 1978).
- 74 BEH letter to Mrs. Beatrice Cameron, 2 EHLR 211:135 (October 30, 1979).
- 75 *Id.*
- 76 34 C.F.R. §300.506(b).
- 77 *Id.* at §300.507. However, this would not prevent a school district from unilaterally selecting another school district's director of special education to serve as an impartial hearing officer. BEH letter to Mr. Harry Onnis, 2 EHLR 211:138 (December 27, 1979).
- 78 43 Fed. Reg. 36036 (August 14, 1978).
- 79 BEH letter to Ms. Lynne Cannon, 2 EHLR 211:67 (September 20, 1978); BEH letter to Mr. Charles L. Kettler, 2 EHLR 211:51 (August 11, 1978); and BEH letter to Mr. Walter Kennedy, 2 EHLR 211:07 (January 20, 1978).
- 80 Civil Action No. 79-1763, 3 EHLR 552:262 (8th Cir., November 3, 1980).
- 81 For a full analysis of this issue see EHLR Analysis and Comment, Supplement 40, 3 EHLR AC101 (January 23, 1981).
- 82 45 Fed. Reg. 85082 (December 24, 1980).
- 83 OCR letter to Mr. Ray Waier, 2 EHLR 257:04 (November 29, 1978).
- 84 OCR letter to Mr. Gerald Marshall, 2 EHLR 257:32 (April 6, 1979); BEH letter to Mr. Glenn Vergason, 2 EHLR 211:21 (April 19, 1978).
- 85 In re "A" Family, 48 U.S.L.W. 2347 (Mont. Sup. Ct. 1979).
- 86 OCR letter to Dr. Robert H. Woodruff, 2 EHLR 257:198 (December 9, 1980).
- 87 34 C.F.R. §300.508(a)(1); BEH letter to Mrs. Carole Van Lieu, 2 EHLR 211:129 (September 26, 1979).
- 88 34 C.F.R. §300.506(c). See also BEH letter to Mr. Gerald Ozan, 2 EHLR 211:13 (March 1, 1978); BEH letter to Mr. Walter Kennedy, 2 EHLR 211:07 (January 20, 1978).

- 89 See EHLR Analysis and Comment 57, Supplement 34, 3 EHLR AC57 (October 17, 1980).
- 90 34 C.F.R. §300.508(a) (2).
- 91 BEH letter to Ms. Sandy Magee, 2 EHLR 211:72 (October 12, 1978).
- 92 BEH letter to Ms. Gail Imobensteg, 2 EHLR 211:15 (March 8, 1978).
- 93 34 C.F.R. §300.508(a) (3).
- 94 20 U.S.C. §1415(b) (1) (A).
- 95 *Id.* Only by initiating the due process hearing may a public agency avoid this expense. Of course, parents may obtain an independent evaluation at their own expense, and the results of such an evaluation would be admissible into evidence at the hearing. 34 C.F.R. §300.503.
- 96 BEH letter to Mr. Griffin B. Bell, Jr., 2 EHLR 211:166 (October 2, 1979).
- 97 34 C.F.R. §300.508(b) (1) and (2).
- 98 In the Matter of . . . , New York SEA Decision No. 9945, 3 EHLR 501:116 (March 12, 1979).
- 99 See SEA New York Decision No. 9938, 3 EHLR 501:114 (March 2, 1979), wherein it was held that no due process violation occurred when the parents were unable to attend the due process hearing. The parents had been given several prior adjournments and had been informed well ahead of time of the final hearing date set by the hearing officer. See also John T. v. Norristown Area School District, Pennsylvania SEA Decision No. 122,, 3 EHLR 501:229 (February 26, 1979), wherein the SEA reviewing officer held that even though due process procedures had not been carried out in a timely manner, the delays were not immediately objected to by the parents and did not cause harm to the child.
- 100 34 C.F.R. §300.508(a) (5).
- 101 Grymes v. State Board of Education, Civil Action No. 79-55, 3 EHLR 552:279 (D. Del., January 7, 1981).
- 102 In re Vandalia-Butler City School District, Ohio SEA Decision, 3 EHLR 501:348 (1979).
- 103 Mark S. v. Pennsburg School District, Pennsylvania SEA Decision No. 134, 3 EHLR 501:399 (1979).
- 104 34 C.F.R. §300.508(a) (4).

- 105 *id.* at §300.512(a). This time period may be extended by the hearing officer at the request of either party. 34 C.F.R. §300.512(c).
- 106 Decision No. 80-1702-Z, 3 EHLR 552:31 (D. Mass. 1980).
- 107 See also *In re J.P., Georgia SEA Decision Case No. 1979-25*, 3 EHLR 501:340 (December 13, 1979).
- 108 45 Fed. Reg. 85082 (December 24, 1980).
- 109 *Terrance S. v. School District of Philadelphia, Pennsylvania SEA Decision No. 137*, 3 EHLR 501:398 (December 3, 1979). See also *In re San Luis Obispo County School, California SEA Decision No. 158*, 3 EHLR 502:111 (October 9, 1981).
- 110 *In the Matter of . . .*, New York SEA Decision No. 10110, 3 EHLR 501:316 (November 20, 1979); *Grymes v. State Board of Education, Civil Action No. 79-55*, 3 EHLR 552:279 (D. Del., January 7, 1981); *Chico Unified School District, California SEA Decision No. SA-80*, 3 EHLR 502:172 (March 27, 1980); *In re Jefferson Local School District, Ohio SEA Decision*, 3 EHLR 501:394 (October 9, 1979); and *In re Los Angeles Unified School District, California SEA Decision No. SH-419*, 3 EHLR 502:249 (February 4, 1981).
- 111 *Cesare B. v. West Shore School District, Pennsylvania SEA Decision No. 149*, 3 EHLR 502:191 (August 13, 1980).
- 112 *In the Matter of the Appeal of Mr. and Mrs. []*, Wisconsin Decision and Order No. 35, 3 EHLR 501:317 (December 21, 1979).
- 113 464 F. Supp. 258 (D. Md. 1979). See also *Breedon v. Maryland State Department of Education, Cir. Ct., Decision No. 64,987*, 3 EHLR 551:262 (March 20, 1979), on appeal to Court of Special Appeals of Maryland.
- 114 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3606 (1981).
- 115 20 U.S.C. §1415(e) (3).
- 116 *Deist v. Adams Central School District No. 909*, Nebraska SEA Decision No. 79-08, 3 EHLR 502:241 (September 22, 1980); *In re Inglewood Unified School District, California SEA Decision No. SH-271*, 3 EHLR 502:235 (December 8, 1980); *Robin G. v. Acushnet Public Schools, Massachusetts SEA Decision No. 3196*, 3 EHLR 502:188 (March 7, 1980); *California SEA Decision No. D-1*, 3 EHLR 501:385 (November 29, 1979); *In re Contra Costa County RLA, California SEA Decision No. SH-76*, 3 EHLR 501:369 (November 14, 1979); *Dale G. v. Pauline School District # 8, Nebraska SEA Decision No. 79-09*, 3 EHLR 501:357 (February 22, 1980); *In re San Francisco Unified School District, California SEA Decision*, 3 EHLR 501:380. But

- see In the Matter of . . . , New York SEA Decision No. 10188, 3 EHLR 501:402 (February 20, 1980).
- 117 This approach has the tacit approval of BEH. Comment to 34 C.F.R. §300.506.
- 118 It has been reported that the State of Minnesota lost \$10 million in federal funds in part for requiring at least one conciliation conference before the mandated federal due process hearing was held. *Pennsylvania School Boards Association Bulletin* at 37 (November/December 1979).
- 119 34 C.F.R. §300.509.
- 120 20 U.S.C. §1415(c) and 34 C.F.R. §300.512(b).
- 121 34 C.F.R. §300.510(b) (1) and (2).
- 122 491 F. Supp. 989 (W.D. Mo. 1980).
- 123 Civil Action No. 79-55, 3 EHLR 552:279 (D. Del., January 7, 1981).
- 124 45 Fed. Reg. 85082 (December 24, 1980)
- 125 34 C.F.R. §300.510(b) (3) and (4).
- 126 In re D.V., Georgia SEA Decision No. 1979-24, 3 EHLR 501:337 (December 13, 1979).
- 127 3 EHLR 552:232 (Minn. Sup. Ct., August 8, 1980).
- 128 In re Jim B., Georgia SEA Decision No. 1981-4, 3 EHLR 502:253 (February 12, 1981).
- 129 In re: Keith S., Washington SEA Decision No. 78-3, 3 EHLR 501:199 (January 3, 1979).
- 130 In re H.L., Georgia SEA Decision, 3 EHLR 501:289 (July 12, 1979).
- 131 Breedon v. Maryland State Department of Education, Cir. Ct. Doc. No. 64,987, 3 EHLR 551:262 (March 20, 1979), on appeal to Court of Special Appeals of Maryland.
- 132 20 U.S.C. §1415(e) (2), and 34 C.F.R. §300.511.
- 133 *Id.*
- 134 Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980); Laura M. v. Special School District No. 1, Decision No. 4-79 c 12 123, 3 EHLR 552:152 (D. Minn., January 21, 1980).

- 135 Independent School District No. 277 v. Pautz, 3 EHLR 552:232 (Minn. Sup. Ct. 1980).
- 136 630 F.2d 237 (4th Cir. 1980).
- 137 BEH letter to Mr. and Mrs. B. Slotnick, 2 EHLR 211:190 (March 31, 1980).
- 138 University of Texas v. Camenisch, 616 F.2d 127 (5th Cir.), *vacated and remanded*, ___ U.S. ___, 101 S. Ct. 1830 (1981). (The appellate court had found no requirement to exhaust remedies before bringing a \$504 private action). Also, a petition for certiorari is currently pending before the U.S. Supreme Court in Davis v. Maine Endwall Central School District, ___ F.2d ___ (2d Cir. 1980), *cert. pending*, Docket No. 1518, wherein the Second Circuit held that exhaustion of remedies under P.L. 94-142 is required before bringing private action under §504.
- 139 Terri Ann Miener v. State of Missouri, Decision No. 79-1050 C (2), 3 EHLR 551:512 (E.D. Mo., January 25, 1980) (no exhaustion of remedies necessary before bringing §504 private enforcement action; however, no right to damages); Sherry v. New York State Education Department, Decision No. Civ.-79-17, 479 F. Supp. 1328 (W.D.N.Y. 1979) (court has jurisdiction over private action alleging failure of SEA to provide due process hearing); Patton v. Dumpson, Decision No. 75 Civ. 4922, 3 EHLR 551:526 (S.D.N.Y., January 23, 1980) (private action for damages implied under §504); Gary B. v. Cronin, Decision No. 79 C 5383, 3 EHLR 551:633 (N.D. Ill., June 10, 1980) (no exhaustion required under P.L. 94-142 and §504 where no meaningful opportunity for review of challenged action); Sessions v. Livingston Parish School Board, Decision No. Civ. A 80-235-B, 501 F. Supp. 251 (M.D. La. 1980) (dismissing for failure to exhaust administrative remedies which would not be futile); Riley v. Ambach, Decision No. 79 C 2783, 3 EHLR 551:668, 675 (E.D.N.Y., June 30, 1980) (exhaustion not required under P.L. 94-142 and §504 where remedies do not provide adequate forum to secure redress of grievances; Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980) (no private cause of action for damages under P.L. 94-142).
- 140 In re Contra Costa County School District, California SEA Decision No. SH-76, 3 EHLR 502:151 (May 16, 1980).
- 141 Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978); Howard S. v. Friendswood Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978); and New York State Association For Retarded Children v. Carey, Decision No. 72-C-356-7 (E.D.N.Y. 1978), 3 EHLR 551:104.
- 142 Howard S. v. Friendswood Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978); OCR letter to Powhattan Unified School District No. 150, 2 EHLR 257:32 (April 6, 1979); OCR letter to Mr. Frank McKenzie, 2 EHLR 257:25 (October 18, 1978).

- 143 OCR letter to Dr. William Randall, 2 EHLR 257:09 (December 20, 1978); Palmyra-Eagle School District, Wisconsin SEA Decision, March 17, 1978.
- 144 ____ U.S. ____, 100 S. Ct. 1398 (1980).
- 145 ____ U.S. ____, 100 S. Ct. 2502 (1980).
- 146 20 U.S.C. §794a(b) and 42 U.S.C. §1988.
- 147 29 U.S.C. §794a.(a)(2) and 20 U.S.C. §1416.
- 148 OCR letter to Mr. Louis Chaney, 2 EHLR 257:29 (March 30, 1979).
- 149 There have been conflicting decisions whether a private right for damages is available under §504 and P.L. 94-142. See *Miener v. Missouri*, Decision No. 79-1050 C (2), 3 EHLR 551:512 (E.D. Mo. 1980) (no action for damages exists under §504 or P.L. 94-142); *Patton v. Dumpson*, Decision No. 75 Civ. 4922, 3 EHLR 551:526 (S.D.N.Y. 1980), (action for damages exists under §504); *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn 1979) (no private cause of action for damages under P.L. 94-142); and *Boxall v. Sequoia Union High School District*, Decision No. C-78-1588 RFP (N.D. Cal. 1979), 3 EHLR 551:239 (P.L. 94-142 legislative history strongly supports compensatory damages for violations thereof). A discussion of the availability of a private right of action for damages is beyond the scope of this paper.
- 150 In re Eric P., Washington SEA Decision No. 79-4, 3 EHLR 501:170 (June 28, 1979); and In re Keith S., Washington SEA Decision No. 78-3, 3 EHLR 501:199 (January 3, 1979).
- 151 *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634 (S.D. Tex. 1978).
- 152 In re Eric P., Washington SEA Decision No. 79-4 (1979), 3 EHLR 501:170, 173.
- 153 454 F. Supp. 634.
- 154 420 U.S. 308, 95 S. Ct. 992 (1975). There are indications that federal courts are moving in the direction of requiring compliance with the procedures of P.L. 94-142 and §504 in order to satisfy the constitutional due process rights of handicapped students. See *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634 (S.D. Tex. 1978) and *Lora v. Board of Ed. of City of New York*, 456 F. Supp. 1211 (E.D.N.Y. 1978).
- 155 454 F. Supp. 634, 638 (S.D. Texas 1978).

- 156 436 U.S. 658, 98 S. Ct. 2018 (1978).
- 157 In re Centralia School District, California SEA Decision No. SR-79-271, 3 EHLR 501:367 (November 1, 1979); In the Matter of . . . , New York SEA Decision No. 10188, 3 EHLR 501:402 (February 20, 1980); and Grace B. v. Millville Area School District, Pennsylvania, SEA Decision No. 143, 3 EHLR 502:107 (April 28, 1980). *But see* In the Matter of . . . , New York SEA Decision No. 10210, 3 EHLR 501:407 (March 7, 1980).

PUBLIC LAW 94-142:
IDENTIFICATION AND EVALUATION

By: Carmela M. Bowns

INTRODUCTION

The purpose of this presentation is to provide a working knowledge of the Education for All Handicapped Children Act of 1975,¹ (hereafter the Act or P.L. 94-142) and its regulatory requirements relating to the identification and evaluation of handicapped students and their special education and related service requirements. References made will be primarily to the regulations implementing the Act, which may be found at 34 C.F.R. §300.²

Both federal and state agencies are responsible for providing interpretations of the law and/or regulations. On the federal level, the Bureau of Education for the Handicapped (BEH), Office of Education, (the predecessor of OSE) is the responsible administrative agency; however, because of the interrelationship between the Act and §504 of the Rehabilitation Act of 1973,³ the Office for Civil Rights (OCR) also makes decisions that affect school districts in their provision of special education to handicapped children. BEH provides information or interpretation of P.L. 94-142 in one of three ways:

1. By answering individual questions it receives (Policy Letter);
2. By corresponding with chief state school officers regarding how to apply for and administer programs with P.L. 94-142 funds (Division of Assistance to States);
3. By issuing policy or position statements to clarify areas which have been of general concern to the public and/or to school districts.

On the state level, both state educational agencies and local school districts are involved in interpreting provisions of P.L. 94-142. Locally, this occurs in the daily implementation of special education programs and as a result of decisions rendered by hearing officers at local level due process hearings. At the state level, interpretation occurs as a result of the state educational agency implementing state law and/or regulations regarding special education requirements. It also occurs when the state reviews a local level hearing officer's due process hearing decision.

The judiciary is an additional source of interpretative authority. Both state and federal courts are involved, either as a result of direct appeals to them or as a final step in review of due process hearing decisions.

P.L. 94-142 requires that school districts identify, evaluate, place and provide a free appropriate public education to all handicapped children within their jurisdictions. Although most of the disputed issues and litigation center on placement questions and the appropriateness of the free public education being offered or provided, there are also important issues to be aware of in the areas of both identification and evaluation.

34 C.F.R. §300.124, .127, .128, and .220 are the regulations primarily dealing with identification; 34 C.F.R. §300.453, and .530 to .534 are the regulations primarily dealing with evaluation. Fundamental to a complete understanding and proper application of these sections of the regulations are the definitions contained at 34 C.F.R. §300.5, .13, and .14. These regulations will be reviewed and a survey made of the major issues associated with them, most of which are quite straightforward. In addition, a brief review will be made of some ancillary considerations which raise more complicated and less clear policy questions, including determining when a particular service is a "medical" service as opposed to being a "related" service and whether or not districts are obligated by §504 to provide services that are not required under the Act.

BASIC TERMINOLOGY

Handicapped Children

For P.L. 94-142 purposes, a "handicapped child" is one who, having been evaluated in accordance with the prescribed procedures, is within one of eleven defined categories of handicapping conditions, and who, because of the handicap, needs special education and related services. Note that for P.L. 94-142 purposes, the handicapping condition must be such that the child needs special education and related services.

The eleven categories of handicapping conditions are described briefly below. Each definition, except one, ties the handicapping condition to educational performance.⁴

1. Deaf: Severe hearing impairment which hampers processing of linguistic information, which adversely affects educational performance
2. Deaf-Blind: Concomitant hearing and visual impairment causing such severe problems (including educational

problems) that a program solely for deaf or blind students cannot appropriately accommodate the child.

3. Hard of Hearing: A hearing impairment, other than one meeting the definition of "deaf," which adversely affects a child's educational performance.
4. Mentally Retarded: Significant subaverage general intellectual functioning along with deficits in adaptive behavior, adversely affecting educational performance.
5. Multiple Handicapped: Combined impairment, such as mentally retarded-blind, or mentally retarded-orthopedically impaired, causing such severe educational problems that a program for just one of the impairments is not sufficient.
6. Orthopedically Impaired: A severe orthopedic impairment which adversely affects a child's educational performance. It includes congenital anomaly, disease-caused impairments, or impairments from other causes.
7. Other Health Impaired: Limited strength, vitality, or alertness due to chronic or acute health problems, which adversely affect educational performance.
8. Seriously Emotionally Disturbed: Exhibiting one of the following characteristics to a marked degree over a long period of time, which adversely affects educational performance:

An inability to learn, not explainable by intellectual, sensory, or health factors;

An inability to establish or maintain satisfactory interpersonal relationships with teachers or peers;

Inappropriate types of behavior or feelings under normal circumstances;

General depression or pervasive unhappiness; or

A tendency toward physical symptoms or fears associated with personal or school problems.

This classification includes schizophrenic or autistic children, but not socially maladjusted children.

9. Specific Learning Disability: A disorder in at least one of the basic psychological processes involved in understanding or using written or spoken language, showing itself as an inability to listen, think, speak, read, write, spell or do math. The definition excludes learning problems resulting primarily from environmental, cultural, or economic disadvantages. (This classification is the only one of the eleven which does not specifically include the statement that the condition adversely affects educational performance, but that is because an adverse impact on educational performance is inherent in the definition of specific learning disability.)
10. Speech Impaired: A communications disorder, a language or voice impairment, such as stuttering or extreme hoarseness, adversely affecting educational performance
11. Visual Handicap: A visual impairment, which although it may be corrected, still adversely affects a child's educational performance.

To qualify under the Act, a child must meet the definition of one of these categories. In addition, he or she must be found to be in need of special education and related services as a result of his or her impairment.⁵

Special Education

Since a child must have both a qualifying handicapping condition and a resulting need for special education and related services, it is necessary to be familiar with the definition of the terms "special education" and "related services."

"Special education" consists of specially designed instruction to meet the unique needs of a handicapped child. It includes classroom instruction, physical education, home instruction, and hospital and institutional instruction. Special education must be provided at no cost to parents, although it is permissible to charge the same incidental fees (such as yearbook costs or special project fees) as are charged nonhandicapped students.⁶

The comment to this regulation stresses the relationship between the definitions of special education, handicapping condition, and related services by saying that for P.L. 94-142 purposes, a child is not handicapped unless he or she needs special education. Nor is a child eligible for related services unless the child meets the definition of handicapped by having both a handicapping condition and a need for special education.

Related Services

"Related services" are those supportive services that a handicapped child requires to benefit from special education. Related services include transportation, developmental, and corrective services, speech pathology and audiology, physical and occupational therapy, recreation, early identification and assessment of a child's disabilities, counseling services, psychological services and medical services for diagnostic or evaluative purposes. The term also includes school health services, in-school social work services, and parent counseling and training. Each term is further defined in the regulations.⁷

Several important questions are currently being raised about the scope of the related services definition, including

1. Is psychotherapy a psychological service (and thus provided at no cost) or is it a medical service (which if not provided for diagnostic or evaluative purposes need not be provided free to a handicapped child)?
2. Is catheterization a "school health service" (and thus free to the child) or a "medical service" (which the child would not receive at no cost because not intended for diagnostic or evaluation purposes)?
3. And, even if a service is not within the scope of the Act's requirements, is it mandated by OCR for compliance with §504?

With respect to questions 1 and 3, BEH has said that the determination of whether psychotherapy is or is not a related service is to be made on a state-by-state basis. The question is answered by identifying who provides the service: If psychotherapy is provided by a psychiatrist or licensed physician, then it is a "medical service" and not within the scope of the Act. Alternatively, if a state allows psychotherapy to be provided by someone other than a psychiatrist or physician (such as a psychiatric social worker), then it is a "related service" to be provided at no cost to a handicapped student.⁸

The complicating factor is that an October, 1979 letter of finding to the Connecticut Commissioner of Education sent by OCR states that nondiscrimination under §504 may well require provision of psychiatric and psychoterapeutic care when it is necessary to enable a handicapped person to obtain the same level of achievement to the maximum extent possible as the nonhandicapped student.⁹ OCR finds this required not only by §504 but also

by the Act. This interpretation would mean that, although psychotherapy may not be required in your state under BEH's test, it may be required for your school district to comply with the nondiscrimination provisions of §504.

Part of what makes the BEH and OCR positions additionally frustrating is that in a BEH policy letter to Montgomery County Schools, there was a specific statement by BEH that, to avoid the possibility of a BEH-OCR conflict, BEH had reviewed its answer (that the determination depended on state requirements regarding who provided services) with OCR and had obtained OCR's concurrence in its opinion.¹⁰

The crux of the issue is, of course, how much responsibility does the school district have for a student's educational needs compared to his or her emotional needs? Courts presented with the issue have generally included psychotherapy as one of the services to be provided by a school district to a handicapped child, although their decisions have sometimes been made indirectly rather than directly. In *North v. District of Columbia Board of Education*,¹¹ the issue was which District of Columbia agency should bear the cost of a child's residential expenses--the educational agency or the agency with responsibility for the child's social and emotional services? Although finding that generally it might be better for a social service agency to take responsibility for meeting a child's emotional needs, the judge ruled that because of the interrelationship between the student's social, emotional and educational problems, the school board must take responsibility for the residential placement of the child in this case.

A Montana state opinion, *In the Matter of the "A" Family*,¹² held that psychotherapy was a related service to be paid for by the school district. The court reasoned that psychotherapy was included within the standard dictionary definition of "psychological services" rather than within the definition of "medical services". For that reason, the court concluded that the district should bear the costs of psychotherapy.¹³

Catheterization is another service also vaguely defined--is it a medical service or a related service? The arguments on both sides of the catheterization question parallel those related to psychological services: if a medical service, catheterization need not be provided; if it is a school health service, it is to be provided at no cost to the student. (Catheterization involves inserting a catheter into the bladder to drain). The decisions on this issue are also split. The Texas Board of Education has ruled in *Amber T. v. Irving Independent School District*,¹⁴ that catheterization is a medical service and, therefore, not required to be provided free of cost to a child. This decision was upheld in *Tatro v. Texas*,¹⁵ based on a determination that to be a related service for P.L. 94-142 purposes, the service requirement must arise from the effort to educate, which in this case it did not. The court also found that §504 was not violated, saying that "plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in

essence, the setting up of governmental health care for people seeking to participate in such programs."¹⁶

OCR made the opposite ruling on a §504 complaint filed against the North Kansas City (Mo.) School District.¹⁷ In that determination, OCR found that catheterization is a school health service and the failure to provide it violated 34 C.F.R. §104.37a of the §504 regulations.

These issues have not yet been conclusively resolved. Until they are, local and state educational agencies must make determinations based on their best reading of the law and on the needs of their students.

IDENTIFICATION

Under P.L. 94-142, both state and local educational agencies share responsibility for identifying handicapped children. At the state level this is an obligation to identify and to count, within general categories, handicapped children. At the local level, the obligation focuses more specifically on identifying individual children. Since one of the purposes of the Act is to ensure that all handicapped children have a free appropriate public education, it is not unusual that the law requires all states applying for funds to identify and to locate all handicapped children needing special education and related services.¹⁸ In identifying these children, the state is to determine which handicapped children are currently receiving service and which are not, and to make this determination according to disability categories.¹⁹ "All handicapped children" is an encompassing term including children in both public and private schools and institutions within the state.

Each state applying for P.L. 94-142 funds is to include information about the numbers, types and ages of handicapped children within its jurisdiction in its program application. It also is to indicate the number of children receiving and not receiving special education, both in public and private institutions.²⁰ Furthermore, the state must be able to identify, by disability category and age range, how many children are not receiving any education despite being within the age group to be provided a free appropriate public education; and how many children, although served, were not adequately served. These two groups of children are referred to as first and second priority children: After September 1, 1978, the date by which free appropriate public education was mandated, states should be reporting no second priority children, since inadequate education does not meet the requirements of providing a free appropriate public education.²¹

At the local level, each local educational agency is required to have a procedure for identifying all children within its jurisdiction who are handicapped, regardless of the severity of the handicap.²² The local educational agency must also be able to determine which children are being served and which are not, whether enrolled in public or private institutions.

Little litigation has arisen regarding identification procedures or the failure of states or local districts to identify students. In *Mattie T. v. Holladay*,²³ a class action was brought in 1975 against Mississippi state education officials on behalf of all Mississippi school children who are handicapped or regarded as handicapped. The action alleged several violations of the Act and of §504, including failure of the state to provide a program to identify and locate all handicapped children within the state who need special education. Following a summary judgement for plaintiffs, a consent decree was entered in January, 1979, which included procedures to be followed for a statewide "Child Find" process. As part of the process, the state agreed to require school districts to appoint a Child Find director; to publicize Child Find activities; and to contact agencies within the district to explain the Child Find referral process and to obtain referrals.

A second case, *P-1 v. Shedd*,²⁴ involved the Hartford Connecticut School District and the Connecticut Department of Education. Provision of a free appropriate public education was the major issue, although identification questions were also raised. A consent decree was entered which provided an unusual requirement on the subject of identification responsibilities--each year, the Hartford School District is to review the performance of each student and, where necessary, the files and records of students not previously identified as needing special education to determine if a student should be assessed for special education. The decree lists a number of factors (including attendance, achievement compared to ability, and health impairments) to consider in determining whether to refer students for assessments.²⁵ The State Department of Education also agreed to allow statewide publicity of its Child Find efforts, and to maintain a toll-free telephone line for special education and Child Find week.

A third decision presents a slight twist on the normal identification efforts of school districts in that it varies from the prescribed Child Find obligations. As a result of the district court decision in *Armstrong v. Kline*,²⁶ regarding provision of education beyond the normal 180-day school year to certain students, guidelines to identify which persons are within the group needing this extended education were developed. These were approved by the court in December, 1979.²⁷ The basic guideline is as follows:

A handicapped student is entitled to an educational program in excess of 180 days per year if regression caused by an interruption in educational program, together with a student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency or independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition.²⁸

The guideline is to be applied through a special individualized education program (IEP) review for students within several categories that contain potentially eligible recipients. This process was to be completed by January, 1980.

At the state level, there have been at least two interesting administrative decisions regarding identification. These both involve a determination that for P.L. 94-142 purposes, a district was correct in not identifying students as handicapped and providing special education and related services for them.

In one of these cases, *Diane K. v. West Jefferson Hills School District*,²⁹ the parties agreed that the student was physically handicapped in that she suffered from severe chronic asthma. However, her academic work was not affected and she was performing at grade level. The student's parents were requesting a private school placement, whereas the school district contended that it could provide an appropriate education within its system. The state secretary of education found that although certain physical accommodations were required by §504, the student did not meet the Act's definition of handicapped in that her handicapping condition did not adversely affect her educational performance, and found that the district could provide an appropriate program for her. The conclusion in this case was based on the district properly identifying the student as not handicapped.

A Georgia state administrative decision was similar to the Pennsylvania decision. In *In re D.H.*,³⁰ the school district refused to pay tuition for a student placed in a private school by his parent. The mother claimed the student was emotionally disturbed and therefore entitled to the private placement. The hearing officer and state board of education found that the student should not be identified as handicapped and found that the student's difficulties, which both parties concurred existed, were caused by family crises, not by any long-term disability. In reaching his decision, the hearing officer found that not every case of abnormal behavior must be met by the state's providing a special education program to the student.

EVALUATION

A school district receiving P.L. 94-142 funding is required to, and the state is obligated to see that it does, evaluate handicapped children to determine the nature and extent of the child's handicapping condition. "Evaluation" is defined as determining, following procedures set forth at 34 C.F.R. §300.530 to .534, whether a child is handicapped and the nature and extent of the special education and related services needed.³¹ Evaluation requires an individualized determination--one based on tests administered to the child individually rather than on tests administered uniformly to all children in a class or school. The evaluation must be conducted before a child is initially placed in a special education program.³²

Consideration of the evaluation process can most easily be approached in stages. The first stage is that of preevaluation requirements. The initial requirement is that parents be notified before a school proposes (or refuses) to evaluate the student. This notice must conform to the requirements listed in 34 C.F.R. §300.505, including a description of the proposed action, information about each proposed evaluation instrument, and an explanation of the due process procedures available.³³

Parents must also give their written consent before a preplacement evaluation (initial evaluation for placement purposes).³⁴ In order for the consent to be effective, parents must be fully informed of what is to happen (using native language if necessary), must understand the activity, and must be aware that consent, once given, can be revoked at any time.³⁵

Note that while notice is required before every evaluation, written consent is required only before the initial preplacement evaluation. The regulations explicitly state that consent is not required as a condition of any benefit to a parent or child, except for preplacement evaluation and initial placement.³⁶ If a parent refuses to consent and the district believes it necessary to evaluate a child, the district is to use any established state procedures for overriding the parent's refusal to consent or, if none exist, may use P.L. 94-142 hearing procedures to override the parent's failure to consent.³⁷

It is not appropriate to select a surrogate parent as an alternative to obtaining parental consent. Appointment of a surrogate parent is authorized only when no parent can be identified, the parent cannot be located, or the child is a ward of the state,³⁸ not because of uncooperative or obstinate parents.

The second stage of the evaluation process is the evaluation itself. Regulations 34 C.F.R. §§300.530 to .534 form the heart of the evaluation requirements.

Several issues in general relating to evaluations have been litigated. In May of 1979, a class action suit was filed against the New York City Board of Education on behalf of all New York City handicapped children (several thousand), ages 5 through 21, who had not been properly evaluated and placed after the district was notified of their need for evaluation. Defendants conceded they had not met state regulations requiring evaluation within thirty days and placement within sixty days of identification of possibly handicapped children. The court certified the class and appointed a special master to recommend to the court contents of the decree to be entered.

An order was entered in December, 1979, establishing time limits by which defendants were to submit plans for assuring evaluation of identified handicapped children within sixty days (later to be reduced to thirty days)

of identification. Additionally, the defendants agreed to staff and operate "school-based support teams," one in each New York City school, to serve all children in need of evaluation and placement.

Plaintiffs in two other similar cases filed against the school board, one on behalf of children with cerebral palsy and one on behalf of handicapped Hispanic children with limited-English proficiency, participated in formulating the recommendations and presumably are also covered by the decree.³⁹

Another evaluation case is *S-1 v. Turlington*.⁴⁰ in which two of the nine plaintiffs contended that they had not been properly evaluated and placed, and requested a due process hearing. According to the court, defendants may be denied the request for a hearing on the grounds that a hearing was only used to determine the appropriateness of the evaluation or program, not to determine whether there had been a proper evaluation or IEP developed. The court granted a preliminary injunction.

On appeal, the brief of appellant district stated the circumstances somewhat differently, making it difficult to determine what actually happened. The brief stated that the students requested a hearing to determine whether or not they had been evaluated, not whether the evaluation was proper. Furthermore, at the time of the request, one of the students was no longer in attendance and the other had a parent-signed IEP in his file.⁴¹

Finally, the issue in *Frankel v. Comm. of Education, N.Y.*,⁴² was whether, because it failed to timely and properly evaluate a child, the state was responsible for payment of past private school tuition where the student was placed by his parents in a private out-of-state school for the 1975-76 school year. The parents petitioned for tuition, alleging violation of state rules regarding evaluation. The state recommended a public school placement instead and denied tuition. The district court action was filed in May, 1978, and was based on the 1975 Education for All Handicapped Children Act. The state contended that the Act, which became effective in October, 1977, should not be applied retroactively to claims arising prior to its effective date even though the claim had been administratively appealed. The court held for the parents, following the rule that a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice where there is statutory direction or legislative history to the contrary."⁴³

Under this ruling, the parents were reimbursed for tuition expenses for school terms prior to the effective date of the statute mandating a free appropriate public education.

There are several detailed requirements designated to insure that tests and procedures yield an accurate and unbiased evaluation. They include the following:⁴⁴

1. Materials and procedures must be selected and administered so as not to be racially or culturally discriminatory;
2. A child is to be tested in his or her native language, unless it clearly is not feasible to do so;
3. Testing material must have been validated for the specific purpose for which it is used;
4. The tests must be administered by trained personell;
5. Tests employed must be designed to measure a particular need rather than general intelligence; and
6. Tests used must reflect whatever aptitude or achievement level the test was designed to measure, not the child's handicapping condition.

At least two cases before federal district courts have raised issues of racially-biased testing materials. The first of these, *Mattie v. Holladay*,⁴⁵ was settled by a consent decree, which provided that the state defendants would hire at least three special education evaluation specialists as consultants to review and assist the state in implementing non-discriminatory testing and evaluation procedures for mentally retarded and learning disabled children. The state also agreed to time frames by which children referred for evaluation would be evaluated.

For educable mentally retarded (EMR) and specific learning disabled (SLD) children, the state was ordered to insure non-discriminatory testing and evaluation. The "test" to determine this is statistical: The placement rate difference for black and white children in EMR programs is to be less than 1.9 percent; in the SLD program, the difference is to be less than .25 percent by May, 1982. How or why these percents assure non-discrimination was not discussed.⁴⁶

In *Larry P. v. Wilson Riles*,⁴⁷ the problems was the use of standardized individual intelligence tests in connection with placements of educable mentally retarded children. The court ruled that using such tests which are racially and culturally biased, have a discriminatory impact on black children, and have not been validated for placement purposes, violates Title VI, §504, P.L. 94-142, and the California and U.S. Constitutions.⁴⁸

Evaluations must be made by a multi-disciplinary team, including at least one teacher or specialist knowledgeable about the suspected disability area. Furthermore, the child must be assessed in all areas related to the suspected disability, using more than one single evaluation procedure.⁴⁹

To assure a complete evaluation, school districts are required to also consider documented information from sources other than the evaluation tests, including teacher recommendations, physical condition, social or cultural background, adaptive behavior, and aptitude and achievement test results.⁵⁰

Whether an improper evaluation or the failure to catch and correct an improper evaluation by a later reevaluation gives rise to a negligence action for money damages was the issue in *Hoffman v. Board of Education*.⁵¹ The case was dismissed at the appellate level because such actions, for public policy reasons, are not entertained by courts of the state.

The third stage of the evaluation process is the post-evaluation period. At that stage, issues such as parental disagreement with the evaluation, independent educational evaluation, and reevaluation may arise. If the parent disagrees with the district's proposed evaluation decision or with its refusal to make a particular evaluation determination, the parents have the right to a hearing conducted in compliance with the due process procedures of the regulations.⁵²

Parents also always have the right to obtain an independent educational evaluation of the child, i.e., an evaluation conducted by a qualified examiner not employed by the public agency responsible for the child's education.⁵³ Whether this evaluation is paid for by the parents or by the school district depends upon the circumstances.

The independent educational evaluation is to be provided at public expense unless the district, upon learning that the parents disagree with its evaluation, initiates a due process hearing to show that its evaluation is appropriate.⁵⁴ If, as a result of the due process hearing, the district's evaluation is determined to be appropriate, then the independent educational evaluation is not provided at public expense. If the district does not initiate a hearing or its evaluation is not determined to be appropriate, it ensures that the independent educational evaluation is provided at no cost to the parent.

At a state-level hearing in New York, a parent contended that the district should pay for two independent educational evaluations, partly because the district had failed to notify the parent of her right to obtain an independent evaluation. The ruling was that the parent had a right to a publicly funded evaluation only if the district evaluation was inappropriate (which it was found to be since it was not a complete evaluation), but that the district need pay only for one, not two, evaluations.⁵⁵

In Virginia, the issue arose as to what constitutes a proper independent educational evaluation.⁵⁶ The child's parent argued that an independent educational evaluation meant an evaluation of the child and a determination of program issues such as what teaching methods and materials should be used with

the child, based on the definition of evaluations as "procedures used in accordance with §§300.530 to .534 to determine whether a child is handicapped and the nature and extent of the special education and related services the child needs."⁵⁷

The district argued that to interpret the independent evaluation requirement as urged (in this case to decide whether the program would be one of "cued speech" or one of "total communication") would make the IEP process meaningless since decisions about "the specific special education and related services to be provided to the child" are to be a part of the IEP meeting.⁵⁸ The court ruled in favor of the parent.

If an independent evaluation is paid for by the district, it is to be conducted according to the same criteria as normally used by the district, including the location of the evaluation and the examiner's qualifications.⁵⁹

The other instance in which an independent educational evaluation will be provided at public expense is if, as part of a due process hearing, a hearing officer requests such an evaluation.

According to a BEH policy letter,⁶⁰ this does not mean a parent can unilaterally choose an evaluator or insist on going out of state for an evaluation. This view is in keeping with the comments to the regulations that state that while the parents' right to an independent evaluation are to be preserved, a public agency should not have to bear the cost of unreasonably expensive independent evaluations.

A last post-evaluation item is that a full evaluation of a handicapped student is to be conducted at least every three years or more frequently if requested by the parents or teacher, or warranted by conditions.⁶¹ This three year reevaluation requirement is in contrast to the requirement to annually review each student's IEP.

CONCLUSION

In dealing with challenges regarding a school district's or state's identification or evaluation process or decision, it is advisable to check a reporter service for up-to-date interpretations and decisions. The full scope of the Education for All Handicapped Children Act is still being decided.

FOOTNOTES

- 1 20 U.S.C. §1401 et seq.
- 2 Formerly 45 C.F.R. §121a, the regulations were recodified effective November 21, 1980. A cross reference index may be found at 45 Fed. Reg. 77368 (November 21, 1980).
- 3 29 U.S.C. §794.
- 4 The full text of the definitions are found in 34 C.F.R. §300.5(b).
- 5 This dual requirement is reiterated in *Appendix A, an Analysis of the Regulations*, published at the time the regulations were adopted in final form.
- 6 34 C.F.R. §300.14.
- 7 34 C.F.R. §300.13.
- 8 BEH Policy Letter to Raphael Minsky, 2 EHLR 211:19 (April 7, 1978).
- 9 CCR Letter of Finding to Hon. Mark R. Shedd, 2 EHLR 257:57 (October 17, 1979).
- 10 BEH Policy Letter to Raphael Minsky, 2 EHLR 211:19-21 (April 7, 1978).
- 11 471 F. Supp. 136 (D.D.C. 1979).
- 12 48 U.S.L.W. 2347 (Mont. Sup. Ct., 1979).
- 13 In *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, *sub nom* *Scanlon v. Battle*, ___ U.S. ___, 49 U.S.L.W. 3949 (June 22, 1981), and *P-1 v. Shedd*, ___ F. Supp. ___ (D.Conn. 1979), 3 EHLR at 551:164, schools were also held responsible for services which included psychotherapy.
- 14 Texas SEA Decision No. 115-SE-579, 3 EHLR at 501:305 (September 8, 1979).
- 15 481 F. Supp. 1224 (N.D. Tex 1979).
- 16 *Id.* at 1229.
- 17 CCR Letter of Finding to Raymond D. Waier, 2 EHLR at 257:04 (November 29, 1978).
- 18 34 C.F.R. §300.128.

- 19 *Id.*
- 20 *Id.* at §300.124.
- 21 *Id.* at §300.127 and .321.
- 22 *Id.* at §300.220.
- 23 ____ F. Supp. ____ (N.D. Miss. 1978), 3 EHLR 551:109.
- 24 ____ F. Supp. ____ (D. Conn. 1979), 3 EHLR 551:164.
- 25 *Id.* at ____, 3 EHLR 551:174.
- 26 *Supra* n. 13.
- 27 3 EHLR at 551:259.
- 28 *Id.*
- 29 Pennsylvania SEA Decision No. 125, 3 EHLR 501:227 (April 13, 1979).
- 30 Georgia SEA Decision, 3 EHLR 501:291 (July 12, 1979).
- 31 34 C.F.R. §300.500.
- 32 *Id.* at §300.531.
- 33 *Id.* at §300.502(a).
- 34 *Id.* at §300.504(b).
- 35 *Id.* at §300.500.
- 36 *Id.* at §300.504(b)2.
- 37 *Id.* at §300.504(c).
- 38 *Id.* at §300.514.
- 39 Jose P. v. Ambach ____ F. Supp. ____ (E.D.N.Y. 1979), 3 EHLR at 551:245 and 551:412; United Cerebral Palsy v. Board of Education, ____ F. Supp. ____ (E.D.N.Y. 1979), 3 EHLR at 551:251; and Dyrchia F. v. Board of Education, No. 79C-2562.
- 40 3 EHLR at 551:211, *aff'd*, 635 F.2d 342 (5th Cir. 1981), *petition for cert. filed* April 23, 1981, Docket No. 80-1770.
- 41 Brief of Appellant School District (October, 1979), 3 EHLR at 551:353.

42 480 F. Supp. 1156 (S.D.N.Y. 1979).
43 *Id.* at _____, citing *Bradley v. Richmond School Board*, 416 U.S. 696,
711 (1973).
44 These requirements are contained at 34 C.F.R. §300.530(b) and .532.
45 3 EHLR at 551:109 (January 26, 1979).
46 *Id.* at 551:116.
47 _____ F. Supp. _____ (N.D. Ca. 1979), 3 EHLR at 551:295.
48 For further explication of this issue, see "Tests and the Placement of
the Handicapped," by Thomas M. Griffin, *infra* p.85.
49 34 C.F.R. §300.532. There are additional requirements for children
suspected of having specific learning disabilities. These requirements
are contained at 34 C.F.R. §300.540-.543. These provisions include the
requirement that an evaluation team member other than the teacher must
observe the student's academic performance in the regular classroom
setting. 34 C.F.R. §300.542.
50 34 C.F.R. §300.533.
51 No. 562 N.Y. Court of Appeals, 3 EHLR 551:362 (December 17, 1979).
52 34 C.F.R. §300.504.
53 *Id.* at §300.503.
54 *Id.* at §300.503(b).
55 In the Matter . . . , New York SEA Decision No. 10104, 3 EHLR at 501:299
(November 1, 1979).
56 *Winfield v. School Board of Fairfax*, No. 46028, Cir. Ct. Fairfax County,
Va., 3 EHLR 551:269 (September 4, 1979).
57 34 C.F.R. §300.500.
58 *Id.* at §300.346(c).
59 *Id.* at §300.503(e).
60 2 EHLR at 211:132.
61 34 C.F.R. §300.534.

P.L. 94-142
WHAT CONSTITUTES A "RELATED SERVICE?"

By: Sharon Howard

INTRODUCTION

One of the most frequently disputed matters for due process hearings concerns the components of an "appropriate placement" and what "related services" must be provided. Often the issue is characterized as what determines an appropriate placement while the specific dispute is what related services must be provided. Because of the time and expense tied to providing related services, it is a fertile area for conflict and one which merits careful consideration.

STATUTORY AND REGULATORY FRAMEWORK

The definitions found in the laws and regulations raise important questions when considering what constitutes a related service. For analysis consider portions of the language of the Education for All Handicapped Children Act (hereafter the Act or P.L. 94-142),¹ the regulations for P.L. 94-142,² and the regulations of §504 of the Rehabilitation Act of 1973.³

DEFINITIONS

Handicapped Children

Under the Act, the term handicapped child refers to those who are

mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.⁴

Under the regulations to the Act, the term "handicapped children" means

those children evaluated in accordance with [34 C.F.R.] §300.530-.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf/blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.⁵

Related Services

Under the Act, the term "related services" refers to

transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.⁶

The last sentence of the regulations to this section expands upon the definition. As used in this part, the term "related services" means

transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.⁷ (emphasis added)

Appropriate Education

The regulations for §504 define an appropriate education as

the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [34 C.F.R.] §104.34, .35, and .36.⁸

Free Appropriate Public Education

The term "free appropriate public education" means

special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program [IEP] required under §1414(a)(5) of this title.⁹

As used in the regulations, the term "free appropriate public education" means special education and related services which

1. are provided at public expense, under public supervision and direction, and without charge;¹⁰
2. meet the standards of the state educational agency, including the requirements of this part;¹¹
3. include preschool, elementary school, or secondary school education in the state involved;¹² and
4. are provided in conformity with an individualized education program which meets the requirements under §300.340-.349 of Subpart C.¹³

Special Education

The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.¹⁴

Under the regulations for the Act,¹⁵ "special education" is defined as

1. . . . specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

2. The term includes speech pathology or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under state standards.
3. The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

Relative to the question of "state standards" mentioned in the definition of "special education" one needs to be aware that the regulations for §504 state that:

The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.¹⁶

WHEN IS A RELATED SERVICE REQUIRED?

In order for a related service to be required for a given student, the child must have been assessed and found to be handicapped in accordance with the Act's and its regulations' definition of "handicapped children," and must be in need of "special education."

If special education is not required then a related service is not required.¹⁷ Comment (1) to regulation 34 C.F.R. §300.14 explains this limitation:

The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in §300.5). The definition of "related services" (§300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child [because he or she is not "handicapped"] is not covered under this Act.

In practice the application of this premise is more difficult to resolve. For example, if a student is properly assessed and found to be seriously emotionally disturbed, but performs well in the regular program without "specially designed instruction," so long as emotional stability is maintained with intensive counseling, can the counseling be a "related service?" It would not seem to be under the definition and the above-quoted comment since the student would not be "handicapped" as defined by the Act. However, the school district would then need to consider its obligations under §504. In at least one case the Office for Civil Rights (OCR) found a §504 violation when a district declined to pay full residential costs including psychiatric costs. OCR disagreed with the district's argument that such costs were not educational.¹⁸

To further confuse matters, BEH has said that if a related service, such as physical therapy, is defined by a state as special education, it may be provided even if no other special education is given; but that if such therapy is defined as a related service, then it may not be provided to a child who receives no special education.¹⁹ Therefore, it is obvious that state definitions must be considered if a related service is in question.

According to BEH, the related services mentioned in the statutes and regulations are not an exhaustive list, and the need for a related service should be considered on a case by case basis.²⁰ The nature and extent of related services required by each child are to be determined through the IEP process based upon educational judgment.²¹

If a school district has included a type of related service as part of the educational program in the IEP, then the related service will need to be provided. Further, 34 C.F.R. §300.346 requires that the IEP for each child must include "a statement of the specific special education and related services to be provided the child. . . ." 34 C.F.R. §300.349 reinforces the local district's obligation and states that "each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program."

The expense of a related service is irrelevant if the service is required.²² However, the service can be contracted through an outside agency so long as the state education agency keeps primary responsibility.²³

TYPES OF RELATED SERVICES

Psychotherapy, Counseling, and Medical Services

Psychotherapy, counseling, and medical services are a repeated source of dispute in the issue of providing related services. For the most part local

districts have lost in these conflicts. Nevertheless, if a requested "related service" consists mainly of intensive psychiatric treatment provided either directly by a physician or by a professional supervised by a physician, it may be considered "medical services" and not a "related service." Therefore such psychiatric service is not required.²⁴ However, if medical services are listed as related services on an IEP they must be provided and paid by the school district.²⁵ The answer to whether psychotherapy is a required related service may, as with other related services, be determined by looking to state regulations. For example, if state regulations define psychiatric therapy as "counseling," it is a related service that must be provided at no cost to the parents.²⁶

A school district may be held responsible for the costs of both residential placement and psychological counseling if the district does not dispute the need for residential placement and the placement is necessary to provide special education, regardless of whether the source of that necessity is physiological, psychological or medical rather than "educational."²⁷ Psychotherapy has been found to be an essential related service in an IEP if it is needed for a handicapped student to progress in school.²⁸ As OCR held in a complaint concerning residential placement, "educational needs are not defined in purely academic or special education terms."²⁹ In another situation, OCR concluded that the Illinois Board of Education violated its "legal duty to provide medical, emotional or psychiatric services" by its refusal to pay for "noneducational services," stating that:

The key concept is that the education must be designed to meet the educational needs of handicapped students as adequately as the needs of the nonhandicapped students are met. Neither §504 nor [the Act] precludes an "on-going medical" service from constituting a related service. In fact, it is the position of OCR that even a medical service, such as catheterization, may be a related service.³⁰

As seen above, OCR holds the position that catheterization is a related service and at least one court of appeals has agreed. In *Tatro v. Texas*,³¹ the circuit court overturned the trial court and found that catheterization was a related service under 20 U.S.C. §1401(17) and that failure to provide the service was a violation of §504.

On January 19, 1981, the Office of Special Education announced in the Federal Register that the Secretary of Education interpreted P.L. 94-142 and §504 to require catheterization as a "related service."³² However, on May 8, 1981, the new Secretary of Education postponed this notice of interpretation "in order to permit a comprehensive review of related services requirements of Part B of the Act and §504."³³ It will be treated as an allowable cost pending the review.

In a Massachusetts Superior Court action, *School Committee, Town of Truro v. Commonwealth of Massachusetts*,³⁴ a local school district unsuccessfully tried to overturn a state agency decision that had granted a parent's request for counseling by a particular psychologist. The court said that the Bureau of Special Education Appeals had the authority to recommend the engagement of a particular psychologist "where the special needs of the child require that recommendation for an adequate and appropriate program."

In *Gary B. v. Joseph M. Cronin*,³⁵ plaintiffs sought declaratory and injunctive relief as a class action regarding a rule of the Governor's Purchased Care Review Board. The rule excluded counseling and therapeutic services from consideration as special education or related services. The court granted a preliminary injunction as to the named plaintiffs and found that the rule "appears to be inconsistent with the definition of related services" set forth in the Act, §504 and the Illinois School Code. No class was certified.

From a review of the cases and hearings that have concerned psychotherapeutic, counseling, or medical services one can see that once it is established that such services are needed for an appropriate education, even if needed for non-educational reasons, then the local district will often be held responsible for providing the services.

Physical and Occupational Therapy

Physical therapy is a related service if required "to assist a child to benefit from special education." Such therapy is required even if it were originally recommended to prevent the progression of scoliosis or for some other medical reason.³⁶ The question of whether physical therapy or other related services assists "a child to benefit from special education" is a question of fact that must be answered on a case by case analysis.

In a policy letter the Office of Special Education (OSE) responded to an inquiry concerning the scope of physical therapy services and seemed to agree that such services cannot be limited only to evaluation and consultation if "treatment" is needed by a child.

In another case, parents sought evaluation of their handicapped child to determine the need for sensory integration therapy as a related service. The state agency denied the request, asserting that the student was learning-disabled and the requested evaluation was only appropriate for physically handicapped students. The hearing officer disagreed, and the evaluation was ordered.³⁷

Recently OSE discussed in a policy letter the use of a "discrepancy model" to determine whether a handicapped child needed direct occupational therapy services. The policy letter stated that "while such a model might be used as

a guideline, the outcome of using the particular model cannot in and of itself be determinative of whether or not a child requires a particular related service." The response also makes an interesting statement concerning comparative need for related services:

A related service must be provided when necessary in order to provide an appropriate education to meet the educational needs of a child as determined by the child's current evaluation. This standard is applicable for all related services. Accordingly, a higher standard of need may not be established for one related service as compared to another related service if the effect of the higher standard would result in conflict with the overall standard for the provision of related services in general.³⁸

Transportation

Transportation is a mandatory related service if it is included in the IEP as necessary to provide part of an appropriate program or if it is necessary for a child to receive other related services, to get to and from a residential or special school, or to participate in extracurricular activities.³⁹ However, transportation for summer school need not be provided if it is not provided to nonhandicapped children and if the summer program is not a mandated extended program pursuant to an IEP.⁴⁰

In *Lisa T.*, a new bus driver refused to pick up a handicapped student inside the student's home to bring her to the bus. Family members were unable to help, and door-to-door transportation was ordered by a state hearing officer. Otherwise, the hearing officer held, the student would have been confined to home-bound instruction.⁴¹

Fees for transportation which are normally charged to nonhandicapped students or their parents as part of the regular education program may be charged to handicapped students or their parents. These would be considered "incidental fees" consistent with 34 C.F.R. §300.14(b)(1) unless (1) there is only one child in the family, (2) that child is handicapped, and (3) the child requires specially designed transportation such as a lift or ramp.⁴² In the specific case discussed, a district in Orange County, California charged \$177 per year per family. The fee was only assessed to families of handicapped children if the children attended the same schools they would attend if not handicapped.

Recreation Programs or Therapy

For a handicapped student whose problems included withdrawal, loneliness and avoidance of physical activity, a hearing officer in *Sandra T. v. Old*

Rochester Regional School District,⁴³ ruled that a district must provide both a therapeutic specialist (to consult with teachers and to work with the student) and six hours per week of after school activities.

Attendants, Aides, and Interpreters

An instructional aide or interpreter has been required when needed to help a student to integrate into the regular program.⁴⁴ However, a sign language interpreter was not ordered where the parents of a totally blind child did not establish how signing could be successfully utilized with the child.⁴⁵ Cornell University was found to be in violation of §504 for not providing sign language interpreters in the classroom. The university had given the cost involved as its reason for not having the interpreters, but OCR held that expense could not be the determining factor.⁴⁶ In *Jeanine G.*,⁴⁷ a full-time signing service was ordered on a three-month trial basis to evaluate its usefulness in a behavior modification program.

OCR found no violation of §504 when the hours of an educational attendant for a quadriplegic were reduced from 30 to 15 hours per week by the Kansas Department of Social and Rehabilitation Services. The basis of the finding was that with care provided by another agency, the complainant received more hours of attendant care than any other individual enrolled in college.⁴⁸

One of the leading cases regarding the need for a sign language interpreter is *Rowley v. Board of Education of Hendrick Hudson Central School District*.⁴⁹ In *Rowley*, the parents of an eight-year-old deaf girl sought an in-class interpreter. The school district denied the request, asserting it was not necessary to an appropriate education, a position upheld at the administrative hearing. The parents sued in federal district court and prevailed both there and on appeal to the circuit court. The case is awaiting action on a petition for certiorari at this time.⁵⁰

Hearing aids or other such individually prescribed items need not be provided.⁵¹

Day Care Services

The Boston Public Schools were not required to pay for day care services for a handicapped student who suffered from seizures, even though the student had been removed from school, in part because the school had said it could not provide adequate supervision for him at school.⁵²

Chiropractic Treatment

If chiropractic treatment is not a medical service under state regulation and if it is required to assist a handicapped child to benefit from special education, it may be provided as a related service.⁵³

Drug and Alcohol Detoxification Program

At a due process hearing, parents of a handicapped student urged 24-hour private residential placement for their child. The school district argued that the student's problems were caused by truancy and alcohol, which were outside academic areas and not a responsibility of the district. The hearing officer found that a private day school placement was required and that the related services should be provided in the form of (1) a drug/alcohol detoxification program, (2) individual psychological counseling, and (3) family counseling.⁵⁴

Note Taking and Optometric Services

Note taking, optometric services, and/or visual therapy may be provided as a related service if needed to assist a handicapped child to benefit from special education.⁵⁵

At a due process hearing in California the parents of a physically handicapped child contended that the school district's refusal to provide the child with a computer as part of the IEP denied him a free appropriate public education. However, the State Superintendent of Public Instruction ruled that other instructional aids were appropriate and that although a computer might be better, "the law only requires an 'appropriate' program--not the best one."⁵⁶

Related Services for Parents

A few cases have held that related services must include services to the parents of the handicapped child. In *In re Los Angeles USD*,⁵⁷ a hearing officer ordered that the school district must provide counseling to parents as a related service and that the counseling must be separate from that provided to the student, so as not to reduce the counseling time for the student. However, the result in this case may have been occasioned by the fact that the Los Angeles School District had itself already agreed to include the parent in counseling sessions.

The California State Superintendent of Instruction has in another matter held sign language training must be provided to the guardian of a sight and hearing impaired three-year-old.⁵⁸

RELATED SERVICES FOR NON-PUBLIC SCHOOL STUDENTS

P.L. 94-142 and its implementing regulations also provide for the provision of special education and related services to private school students.⁵⁹ The Act requires that each state plan shall have policies and procedures to assure

1. that, to the extent consistent with the number and location of handicapped children in the state who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and
2. that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such state, and (ii) in all such instances, the state educational agency shall determine whether such schools and facilities meet standards that apply to state and local educational agencies and that children so served have all the rights they would have if served by such agencies.

In a New York case, the parents of a handicapped child sought related services consisting of physical/occupational therapy and remedial reading instruction for their son at a parochial school. The New York state law required the local district to provide such services "to pupils who are residents of the State and who attend non-public schools located in such school districts." Therefore, the related services were to be provided.⁶⁰

CONCLUSION

When the question concerns the need for a given related service, the threshold inquiry must always be whether the related service is required to assist the handicapped child to benefit from special education. If the answer is "no", chances are that other "related services" issues will never be reached. However, if the answer is "yes," questions may well remain regarding the nature, extent, or frequency of the related services, what agency is responsible, where the services will be provided, what professional will provide the services, what limitations on the service may exist under state law or regulation, what happens if no specially designed instruction is required, and/or what happens if the service is a medical service.

The issues surrounding related services continue to multiply and change while the sources of revenue to provide the services remain in question. Thus, the challenge can only be ever greater to school districts trying to meet the demand for special education and related services.

FOOTNOTES

- 1 20 U.S.C. §1401 *et seq.*
- 2 34 C.F.R. §300. Effective November 21, 1980, these regulations were
recodified from 45 C.F.R. §121a. A cross reference index may be found
at 45 Fed. Reg. 77368 (Nov. 21, 1980).
- 3 29 U.S.C. §794. The regulations may be found at 34 C.F.R. §104.
- 4 20 U.S.C. §1401(1).
- 5 34 C.F.R. §300.5(a).
- 6 20 U.S.C. §1401(17).
- 7 34 C.F.R. §300.13.
- 8 34 C.F.R. §104.33. In light of the decision in *Texas v. Camenisch*,
U.S._____, 101 S. Ct. 1830 (1981), a question as to the validity of the
extent of the regulations under §504 should be considered.
- 9 20 U.S.C. §1401(18).
- 10 34 C.F.R. §300.4a.
- 11 *Id.* at §300.4b.
- 12 *Id.* at §300.4c.
- 13 *Id.* at §300.4d.
- 14 20 U.S.C. §1401(16).
- 15 34 C.F.R. §300.14(a).
- 16 34 C.F.R. §104.10.
- 17 BEH Policy Letter to David Rosen, 2 EHLR 211:57 (August 18, 1978).
- 18 CCR Letter of Finding to Mark R. Shedd, 2 EHLR 257:57 (October, 1979).
- 19 BEH Policy Letter to Thomas E. Long, 2 EHLR 211:167 (June 8, 1979).
- 20 BEH Policy Letter to Irving Levine, 2 EHLR 211:122 (August 23, 1979).
- 21 BEH Policy Letter to Dr. James W. Clark, Jr., 2 EHLR 211:43 (August 2,
1978).

- 22 Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).
- 23 34 C.F.R. §300.600.
- 24 In the Matter of . . . , New York SEA Decision No. 10263, 3 EHLR 502:122 (May 16, 1980).
- 25 BEH Policy Letter to Sylvia Vedalakis, 2 EHLR 211:173 (February 12, 1980).
- 26 BEH Policy Letter to G. Dale Janda, 2 EHLR 211:205 (January 25, 1979).
- 27 In re: Palo Alto City Unified School District, California SEA Decision No SH-74, 3 EHLR 502:186 (May 27, 1980).
- 28 Robin C. v. Acushnet Public Schools, Massachusetts SEA Decision No. 319 G, 3 EHLR 502:188 (March 7, 1980).
- 29 OCR Letter of Finding to Dr. Bennett Plotkin, 2 EHLR 257:55 (November 27, 1979).
- 30 OCR Letter of Finding to Dr. Joseph M. Cronin, 2 EHLR 257:93 (February 27, 1980).
- 31 625 F.2d 557 (5th Cir. 1980).
- 32 46 Fed. Reg. 4912 (1981).
- 33 46 Fed. Reg. 12495; 46 Fed. Reg. 18975; 46 Fed. Reg. 25614.
- 34 Massachusetts Superior Court No. 39756, 3 EHLR 552:186 (June 27, 1980).
- 35 No. 79C5383 (N.D. Ill. 1980)
- 36 Julie C. v. Marshfield Public Schools, Massachusetts SEA Decision No. 3486, 3 EHLR 502:170 (October 7, 1980).
- 37 In re: Santa Barbara County School District, California SEA Decision No. SH-159, 3 EHLR 502:128 (July 25, 1980).
- 38 Policy Letter to Linda J. Jacobs, 2 EHLR 211:262-263 (February 18, 1981).
- 39 OSPR I/1/27 (April 23, 1979) 2 EHLR 259:02, BEH Policy Letter to Hon. Henry Dorman, 2 EHLR 211:70 (October 4, 1978).
- 40 OCR "§504 letter" to Douglas T. McGarvie, 2 EHLR 254:02 (May 11, 1978).
- 41 Connecticut SEA Decision No. 80-85, 3 EHLR 502:230 (December 17, 1980).

- 42 BEH Policy Letter to Kent A. Stormer, 2 EHLR 211:108 (March 9, 1979).
- 43 Massachusetts SEA Decision No. 3231, 3 EHLR 502:181 (October 3, 1980).
- 44 In re: The West Covina Unified School District, California SEA Decision No. SH-193, 3 EHLR 502:209 (November 10, 1980).
- 45 In the Matter of . . . , New York SEA Decision No. 10494, 3 EHLR 502:264 (March 17, 1981).
- 46 OCR Letter of Finding to Frank Rhodes, 2 EHLR 257:02 (September 15, 1978).
- 47 Connecticut SEA Decision No. 80-39, 3 EHLR 502:148 (July 2, 1980).
- 48 OCR Letter of Finding to Rose Stewart, 2 EHLR 257:12 (December 29, 1978).
- 49 632 F.2d 945 (2d Cir. 1979). School districts, however, may be interested in the discussion by the dissent.
- 50 *Petition for certiorari* filed December 15, 1980, Docket # 80-1002.
- 51 BEH Policy Letter to Raphael Minsky, 2 EHLR 211:19 (April 7, 1979).
- 52 Christopher H. v. Boston Public Schools, Massachusetts SEA Decision No. 3681, 3 EHLR 502:255 (February 18, 1981).
- 53 BEH Policy Letter to Carl M. Halton, 2 EHLR 211:18 (March 31, 1978).
- 54 In re: Capistrano USD, California SEA Decision No. SH-176, 3 EHLR 502:129 (July 25, 1980).
- 55 BEH Policy Letter to Donald F. Rielk, 2 EHLR 211:122 (August 23, 1979); BEH Policy Letter to James W. Clark, 2 EHLR 211:43 (March 24, 1978).
- 56 Chico Unified School District, California SEA Decision No. SA-80, 3 EHLR 502:172 (March 27, 1980).
- 57 California SEA Decision No. SH-276, 3 EHLR 502:266 (February 4, 1981).
- 58 In re: San Mateo County Superintendent of Schools, California SEA Decision No. SH-221, 3 EHLR 502:199 (November 10, 1980).
- 59 20 U.S.C. §1413(a) 4(A) and (B).
- 60 In the Matter of . . . , New York SEA Decision No. 10245, 3 EHLR 502:121 (April 14, 1980).

TESTS AND THE PLACEMENT OF HANDICAPPED STUDENTS:

LARRY P. V. RILES

By: Thomas M. Griffin

INTRODUCTION

Discussing the subject of testing handicapped students - in particular, the subject of I.Q. tests--is done with a good deal of reluctance. There is hardly a subject in education that raises the emotions more than the subject of testing. This is particularly true when reviewing testing of handicapped pupils, minority pupils or others who, the prevailing wisdom says, will not do as well on the tests.

PUBLIC REACTION TO TEST RESULTS

Those of us who are involved in education are on the horns of the dilemma when it comes to the testing issue. A very strong move exists in education - and elsewhere in government - towards greater accountability. With good reason, parents and other taxpayers want to know with some precision what they are getting for their money. They are particularly anxious about this issue when the press continually points out, correctly or incorrectly, that test scores are declining and that students in greater numbers cannot read, write or compute at satisfactory levels. The answer to this demand is obvious: standardized tests should be administered at regular intervals and the results publicized. Taxpayers can see whether their district is doing better than it did last year or is doing better than neighboring districts on such tests as the Comprehensive Test of Basic Skills or the SRA.

California has fostered this competition by developing its own California assessment program. Children are tested every year in the first, second, third, sixth and twelfth grades in reading, language arts, and mathematics. To throw fuel on the fire, the results of these tests are released annually. Virtually every newspaper in the state publicizes the results by state average, district average, and school-by-school average.

An additional aspect of this demand for accountability is the push toward high school proficiency standards. More than one-half of the states now require a high school senior to pass proficiency standards as a condition of graduation from high school. To pass, the student must demonstrate an ability to function at least at a minimum level of proficiency in the so-called basic adult skills. In most states the proficiency tests and the levels to be attained before a student may graduate are specified by the state. In a few states such as California, each district specifies its own area of proficiency and its own minimum levels of performance.

While this point of view is valid, it can be taken to extremes. Most tests must be standardized on a large population if they are to be considered valid in measuring the progress of a district, school or pupil. Thus, standardized tests are based on an average. No matter how good the school system is, no matter how much smarter or better educated the children are over those who graduated 20 years ago, one-half of our children will be below average. There is an implication that a school that moves from the 50th percentile to the 45th percentile is regressing, and students are not learning. Clearly, this is not necessarily the case.

CRITICISM OF TESTS

If there is a force in favor of testing as a measure of accountability, there is a counter force as well. Tests have come under increasing criticism for a number of reasons. Their detractors argue that the tests consume class time and increase the paperwork burden of schools and teachers, do not necessarily test what is taught, especially in the affective areas, and are not designed to measure movement toward local instructional objectives. They claim the tests are unfair to children who know the material but cannot do well on standardized, machine-scored tests, and the results are misused to label children and place them in inappropriate groups.

Although these arguments all have some validity, there is also a danger in carrying them to an extreme. Just as the ancient Greeks had a practice of killing the messenger that brought bad news, there is a danger that tests will be rejected because the results are disliked. Some persons believe this is what the court has done in throwing out IQ tests in the assessment of minority children in *Larry P. v. Wilson Riles*. (495 F. Supp. 926 (N.D. Ca. 1979)).

LEGAL IMPLICATIONS

While not belaboring the legal issues inherent in the general issue of testing, it is clear that the issues with respect to handicapped pupils include the issues inherent in the testing of all pupils, handicapped and nonhandicapped alike. In addition, there are several aspects of these issues which apply with particular force to the testing of pupils with particular kinds of handicaps.

In reviewing some specifics, it is understood that students must be treated with fundamental fairness in the testing process, as well as in other aspects of school relationships. Courts tend to view lawsuits between students and schools from the point of the student and inquire whether the school has treated the student with basic fairness. The school must avoid the appearance of arbitrariness and of acting for the achievement of administrative convenience rather than pupil welfare. This is particularly

true when the result of the test has important consequences for the future education of the student. In some instances the score of the student on a test--particularly if one considers tests in the broader sense of assessment--dictates placement for a pupil for at least a year and perhaps longer.

Within this framework of fundamental fairness there are at least three legal problems facing schools in the general area of testing. First, the school must have a right to administer the particular test. There is no doubt that a school has the right to post-test children to determine whether they have learned the materials to which they have been exposed. In many instances, however, one must question why the school needs to know about the subject matter for which the test is being administered. Why does the school need to know the aptitude of the pupil? Why does the school need to know "intelligence"? The answer to these questions depends, in part, upon what the school does with the result.

The second major legal requirement is that there be a reasonable relationship between what is being tested and the method used by the school to assess proficiency in that area. The reference to "tests" brings to mind pencil and paper tests, but the district should first consider "hands on" assessments whereby students can demonstrate their competence at a skill by doing rather than by describing. Many children do not do well in a structured testing situation. In the assessment of children who are mentally retarded, there is a strong effort to focus on adaptive behavior as a supplement to academic functioning to avoid misidentification of children who score poorly on tests, but who function adequately in their environment. Deaf, blind or physically handicapped pupils may need alternative methods of demonstrating their knowledge or skill.

It is also necessary to be cautious in administering written or oral assessments to children in the English language alone. It is one thing to require a student to communicate in English as a skill area and to deny a student a satisfactory grade in an English class if he or she does not do so. It is another matter, however, to purport to test a child's skill in math through a pencil and paper test in the English language. It is obviously unfair to fail a child in math if the problem is an inability to understand the question in English. However, it was not so long ago that Hispanic and other children were placed in classes for the educable mentally retarded on the basis of group I.Q. tests administered in English.

The third major legal consideration is that there exist a relationship between what is tested and what is taught in school. Most standardized tests presuppose that students have had a similar degree of exposure to the information tested. To the extent that I.Q. tests measure mental processes and functioning, this assumption is not particularly unfair. For example, if a child is asked "What is the next number in this sequence: 2, 4, 6, 8, ___?", either the child does or does not see the relationship. It is very difficult

for a child's answer to be influenced by environmental factors. But if the child is asked "What do a pineapple and a banana have in common?", the child may be at a disadvantage. The question purports to measure the ability of the child to form generalizations, but instead may measure his vocabulary.

Again, part of this problem is the use of the results. Affluent children generally enter school with a higher reading or reading-readiness level than do poor children. Where the purpose of the test is to identify children who need reading help, a test is fair. But it is unfair to draw conclusions about a child's ability to learn from the fact that he has not yet learned.

THE LARRY P. DECISION

It is interesting to note the way in which these principles apply in the *Larry P.* case. The complaint in that case was originally filed in 1971 challenging as unconstitutional the use of standardized intelligence tests for the placement of black children in classes for the educable mentally retarded (EMR) in San Francisco. In December of 1974 the class of children represented in the suit was expanded to include all black children in the State of California who have been or may in the future be classified as mentally retarded on the basis of I.Q. tests. At that time a preliminary injunction enjoined the Superintendent of Public Instruction and the State Board of Education from "placing black children in California into classes for the educable mentally retarded on the basis of the results of any tests which do not properly account for the cultural background of these children."

In an opinion dated October 16, 1979, the court found for the plaintiffs and held that standardized I.Q. tests discriminate against the black pupils on the basis of their race, enjoining the tests' use in California for the placement of black children in EMR classes. The Superintendent of Public Instruction has filed an appeal from the subsequent judgment on a number of grounds.

However, the opinion of the court appears to deal inconsistently with the basic issues inherent in the testing process, among them the right to test, the reasonable nexus requirement, and the problems of biased tests.

RIGHT TO TEST

Does a school have the right to test in the skill or subject matter being tested? In the context of this case, the question is whether the school has the right to test the intelligence of the child at all. The plaintiffs proceeded from the fundamental philosophy that there is no such thing as intelligence, at least in any measurable sense that distinguishes one child from another. They submit that intelligence in our society consists of a number of attributes, including creativity and the ability to interact appropriately with one's environment, and that these factors are not measured

by an intelligence test. Since there is no such thing as a measurable quantity called "intelligence," any score which purports to measure that quantity in any particular child is an illusion.

Although intelligence may be an illusive concept, the plaintiffs essentially missed the point. In the first place, intelligence tests clearly measure intellectual processes and do not reflect mere achievement in the sense of cultural exposure to specific concepts. They do measure abstract reasoning, they do measure short term memory and they do measure the skills a child needs to succeed in school, an academic and intellectual experience rather than a social one. It is not facetious to suggest that I.Q. tests do, in fact, test what they test. Regardless of whether one defines what they test as innate "intelligence" or something else, they are accurate predictors of later success in school and, through standardization, fairly accurately compare the skill of a child with the skill of a large number of that child's chronological peers. For example, the test can measure the ability of a seven-year old to memorize a seven digit number such as the child's own telephone number. A certain percentage of children that age can memorize that number and another percentage cannot. Whether the ability to remember your telephone number is defined as part of "intelligence" or not, the exercise is a valid measure of the child's mental maturity. Perhaps the legal definition of bias should be whether the test predicts later success in school equally well for both blacks and whites.

In the second place, the argument of the plaintiffs which the court has accepted misconstrues the purpose for which the tests are given. At one point in time, the total score on an I.Q. test, be it 68 or 76, was the major if not the sole determinant of where that child should be placed. The state of the art, however, has progressed well past that point. In fact, the purpose of the test, properly used, is not to determine placement at all. The purpose of the test is to diagnose the educational needs of the child so that an appropriate educational program may be prescribed which maximizes the child's opportunity to succeed. For example, a common occurrence in a regular classroom is for the teacher to instruct pupils to take out a piece of paper and pencil and put their name and date in the upper right hand corner. While such an instruction seems elementary, it is really four separate instructions. Some children cannot remember four instructions in a row at their stage of mental maturity. Again, it is not necessary to consider short term memory as a part of "intelligence" or as a part of anything. However, in planning a program for the child, that bit of information is helpful to know.

Under recent law, California no longer recognizes the EMR classification. Under the categorical aid programs that existed in California and elsewhere, a child had to be identified or labeled as having a particular handicapping condition before being eligible for special services. However, California has developed what is called the "master plan" for special education which does not look at the child's handicapping condition, but requires districts to look at the level of service needed for that child under the individualized

education plan. A resource specialist has been added to the regular school so that children may receive assistance in that school, thereby facilitating the mainstreaming concept. The district must consider the spectrum of potential educational placements, from the least restrictive, i.e., placement in a regular class with minimum intervention, to the most restrictive, i.e., placement in a private school or a special education center. The question then becomes not "what is this child's handicap?" but "where on the spectrum of placement can this child best function?" Standardized I.Q. tests offer information helpful in making that determination.

REASONABLE NEXUS

The second legal requirement is that of a reasonable nexus between what is being tested and the method used. The court really doesn't discuss this issue but instead assumes, as do the plaintiffs, that intelligence cannot be measured.

It is recognized that the educational needs of the child cannot be determined through any one test or any one assessment. A number of areas must be examined in order to determine why a child has not succeeded in regular class placement at that time. A much improved process has been developed over that which was commonly used just a few years ago and will probably be much improved in the coming years. At this point, however, the basis for the process is a belief that a child should be examined from a number of points of view and that the determination of education needs should be consistent with these various perspectives.

For example, the developmental history should be documented, and the adapted behavior of the child should be measured both in the classroom situation and in the home. The child's sociological background should be noted, including any factors relating to home support for school or the lack thereof. Of course, the pupil's academic success should be documented, including the results of such programs as bilingual education, compensatory education, or other special help. It is also stressed that the child should be tested in the primary language of the home or the language or languages in which the child communicates best.

Admittedly the diagnosis of educational need is a very inexact science. However, schools cannot afford to overlook the evidence merely because it does not set well with ideas of how things ought to be.

BIAS

The third major consideration is the child's exposure to the information tested. There are two points to be made in this regard. First, the I.Q. test must be administered by a professional trained in the testing process and knowledgeable of the child's language and cultural background. The assessor must be cognizant of vocabulary or concepts which the child may not have had

the same degree of exposure to as a child from the so-called "core culture." The answer that the child gives to those particular questions must be interpreted in the light of this exposure.

Second, there is nothing inherently wrong with the child failing the test which measures his exposure to the core culture so long as the result of such failure is the prescription of the compensatory program to make up for that lack of exposure. Again, it is not necessary to determine whether a child is incapable of learning or is merely uneducated. For educational purposes, it is enough to observe that the child does not have a particular skill or mastery of a knowledge area in this point in time. The individualized education program should take the child from where he is to wherever he can go.

Much has been said about bias on I.Q. tests. Bias to the plaintiffs is measured by whether blacks fail the test in disproportionate numbers. Bias to the testor is whether the test measures what it is supposed to measure. This distinction is crucial. Under the plaintiff's definition of bias, a tape measure would be biased if it showed that Asians as a group are shorter than blacks as a group. However, if a test accurately predicts who will succeed and who will fail in an academic classroom and predicts just as accurately for blacks as for whites and for poor children as rich children, the test does what it is supposed to do. It must be recognized that for reasons not fully understood, poor children do less well in our schools than rich children.

COURT'S CONCLUSION

The court observed the phenomenon that black children as a group do significantly less well on an I.Q. test than white children as a group and concluded that I.Q. tests were inherently biased against black children because of their race and thus violated Title VII of the Civil Rights Act, the Rehabilitation Act of 1973 and the Education for all Handicapped Children Act of 1975. Clearly then, they had to be banned for all black children, but only as to placement in the EMR classes.

There is a significant disparity in some districts between the percentage of black children enrolled in the district and the percentage of black children enrolled in EMR classes. However, districts do not test all children. Traditionally, the only children who had been tested are those referred by classroom teachers. Neither the plaintiffs nor the State have any figures at this time as to the racial and ethnic characteristics of the children to whom the I.Q. tests are administered. For example, assume a district has 10% black pupils but 25% of the pupils referred for testing are black. Assume further that 25% of the children diagnosed as retarded as a result of the test are black. It is obvious in this example that the test is absolutely neutral as to race and that the problem with the racial balance of the class is in the referrals and not in the testing.

There was one other bit of information that the court saw fit to note. The result of the injunction in the 1974 banning of the use of tests is a reduced number of children placed in EMR classes, but the racial balance of the children placed has remained constant. In other words, the ban on the I.Q. tests has not served to reduce the disproportion of blacks in the EMR program. It seems obvious that to the degree that standardized tests are not used in the diagnosis, the judgment becomes more subjective. There is no reason to suppose that teacher judgment is less biased than standardized tests. Therefore, the court, in an effort to protect black children from its own opinion, must impose a racial quota on the admission of black children in EMR classes. This the court has done through a rather unusual formula which essentially limits the percentage of black children in EMR classes to the percentage of such children in the district as a whole.

In short, school districts in California are appealing the *Larry P.* decision on two basic grounds. First, they object very strongly to the imposition of a racial quota on any child. When a child is tested in any process and found to be in need of placement, the child should get that placement without regard to the race or ethnic group identification of children already in the program.

Second, the banning of I.Q. tests is an overreaction because much valuable information can be derived from the tests. If the ban was on the use of tests of major determination of placement or if the ban was on the use of the total I.Q. score, there would be agreement. But to the extent that the ban prevents schools from using subpart information in the diagnosis of a child's educational need, there is no agreement.

EDUCATIONAL PLACEMENT OF THE HANDICAPPED:
SELECTED ISSUES

By: Michael I. Levin

INTRODUCTION

The educational placement of the handicapped is governed by a blend of federal and state constitutional, statutory and regulatory mandates, all of which must be fully understood and appreciated before it can be determined whether a particular educational placement is "legal," or, in the vernacular, "appropriate." This article will focus on those various mandates with particular emphasis on the definition of an appropriate education, year-round programming, residential placements, out-of-state placements, selection of classrooms, and the problems attending expulsions and suspensions of handicapped students.

Unfortunately, in all of these areas, relevant constitutional, statutory, and regulatory mandates are yet to be fully or clearly defined by the courts. To the extent that this is true, speculation will be engaged in, for, as Mr. Justice Holmes once noted, the law is nothing more than "the prophecies of what the courts will do in fact."¹ Where the requirements of law need to be speculated upon, the perspective will be that of a school board attempting to preserve its traditional perogatives and to allocate its finite resources fairly, while at the same time providing adequate programs for the handicapped within the spirit and intent of §504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975, (hereafter the Act or P.L. 94-142).² This perspective has been selected because it is the only one that gives due consideration to all competing interests. Admittedly, the handicapped are deserving of adequate programming; but nonhandicapped students attending public schools are entitled to educational programs appropriate to their needs which are undiminished by any sort of crusade which diverts excessive resources from the normal programs.

DEFINING AN APPROPRIATE PROGRAM

The quintessential principle of placement is that all handicapped students must be provided with a "free appropriate public education," which, in practicality, means a program on which the parents and schools agree. Where there is no such agreement, an appropriate program is whatever the experts at a due process hearing say it is. If the parents and the school cannot agree on a particular program, service, or school, a battle of experts will frequently ensue, with final resolution of the issue being made by a hearing officer, generally on the basis of the facts rather than legal principles. However, there will be times when the nature of the dispute is such that it

cannot be decided merely by resolving conflicting expert testimony. Instead, the conflict can be resolved only through a thorough resolution of the legal meaning of the phrase "free appropriate public education." Cases involving such disputes will be comparatively infrequent and are almost nonexistent at this point in time, but it is with a view towards such cases that the following discussion is presented.

Any analysis of the legal definition of a "free appropriate public education" must naturally begin with the statutory definition, which states that

the term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction without charge, meet the standards of the state educational agency, (C) include an appropriate education in the state involved, and (D) are provided in conformity with the individual education program required under Section 1414(a) (5) of this title.³(emphasis added)

The phrases "special education" and "related services" are also specifically defined in the Act:

The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.⁴

The term 'related services' means transportation, and such developmental, corrective and other supportive services . . . as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.⁵

As is readily apparent, these definitions are not a model of clarity.⁶ They are only minimally helpful in actually defining in any given situation what sort of an educational program is required. They provide no guidance, for example, as to the length of the program, class size, educational content, required services or any other specific educational item, leading one commentator to note that

although the Act sets forth the general requirements states must meet in order to qualify for receipt of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements. Instead, the heart of the federal control mechanism is a system of procedural safeguards which provides for parental involvement and educational placement decisions. In effect, the Act guarantees procedures whereby parents may challenge the appropriateness of their child's educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present.⁷

This lack of statutory specificity has effectively allowed the courts to define what Congress intended and to assume the unrestricted power of dictating what is required in any given situation. According to the court in *Rowley v. Hendrick Hudson Central School District*, "it has been left entirely to the courts . . . to give content to the requirement of an 'appropriate education.'"⁸

In assuming the power of unilaterally determining the appropriateness of educational programs, the courts have adopted different standards, which are often in conflict with one another. In *Armstrong v. Kline*,⁹ the court held that a free appropriate education is one which maximizes educational benefits in the area of self-sufficiency and freedom from caretakers. In *Rowley*, on the other hand, the court rejected the maximization standard of *Armstrong* and held that an appropriate education is one which gives a handicapped child an opportunity to achieve his full potential commensurate with the opportunity provided to other children.

It is suggested, however, that both these standards are in error, and that the error flows directly from the courts' misunderstanding of Congress' lack of specificity in defining the phrase "free appropriate public education." If there is any point that must be stressed, it is that the lack of statutory specificity was by congressional design, not accident, and that in refusing to specifically define an appropriate program, Congress remained committed to preserving local control over public education.¹⁰ Indeed, by statutory definition, a "free appropriate public education" is one which "meets the standards of the state educational agency."¹¹

Commenting upon the underlying reasons why P.L. 94-142 was specifically vague in defining appropriate programs, one writer has said:

Perhaps the most significant reason Congress failed to prescribe more specific standards was the traditional notion that education is primarily a state and local concern. Despite the far-reaching procedural provisions of the present statute, Congress was apparently unwilling to take the further step of ordering that process that could lead to federal allocation of state and local funds. In the end, the hard choices required to determine the extent of the right of particular children were consigned to the discretion of local administrators . . .¹²

The standard set forth in *Armstrong* was modified by the Third Circuit on Appeal, which adopted a "process of comparison" for analyzing the appropriateness of an educational program. While the court did not denominate it as such, in essence, this process takes the following form:

1. the educational goals of the nonhandicapped must be considered;
2. to the extent that the handicapped can attain those goals, the programs and services necessary to enable the handicapped child to reach those goals must be provided; and
3. to the extent that the handicapped cannot attain those goals, the states must adopt reasonable modes for achieving those goals.¹³

Importantly, in resolving a variety of issues impacting upon public education, the United States Supreme Court has favored those interpretations consistent with the preservation of local control¹⁴ and it is suggested that in the context of educating and providing services to the handicapped, such an interpretation remains logical.

First, each state must allocate its finite resources among the various programs it operates, and it should properly be left to the officials of those states to make the difficult decisions necessary to meet the needs of their constituents. Second, the programs and services required to be provided by the states as a result of P.L. 94-142 in many times will overlap with programs and services already provided by the states through state health and welfare programs designed to benefit the handicapped. Once again, it should be left to the discretion of the states to coordinate the existing structure with that required by the Act. That is not to suggest, however, that states are free to adopt any standards they see fit. On the contrary, consistent with any

governmental action, prerogatives that states enjoy under P.L. 94-142 are limited by constitutional and equal protection imperatives.

Generally, equal protection requires that handicapped pupils be provided with a level of educational input which is at least minimally beneficial or functional. There are numerous federal court decisions which vividly illustrate that if beneficial programs are being provided to students, the equal protection clause is not being violated, even though other students may be receiving better programs.¹⁵

Defining a "free appropriate public education" in the context of the equal protection decisions, if a minimally beneficial or functional education is provided under state standards, those standards should serve effectively to define the appropriateness of any particular program under the Act.

The definition of a free appropriate public education which is being advanced herein finds support in the legislative history of the Act.¹⁶ It appears that P.L. 94-142 was in fact enacted by Congress primarily to enforce the equal protection clause, the court concluding in *Rowley* that the equal protection clause "motivated the passage of the Act." Specifically, §601(b)(9) of 20 U.S.C. §1401 provides that "it is in the national interest that the federal government assist state and local efforts to provide programs to meet the educational needs of the handicapped children in order to assure equal protection of the law." (emphasis added)¹⁷ The position that Congress intended primarily to insure compliance with the equal protection clause of the federal Constitution through the offer of financial awards to the states ought to be vigorously advanced to the courts.

If P.L. 94-142 was in fact enacted by Congress to enforce the equal protection clause, as it appears it was, then it would not seem to require states to maximize benefits to or achievement of the handicapped.¹⁸ The Act does not appear to contain any language from which it can be said that maximization is required and the legislative history exhibits Congress' rejection of maximization.¹⁹ The concept that states and school districts are not required to maximize educational potential or achievement has been solidified in several court decisions.

In *Springdale School District v. Grace*,²⁰ the court said that "the Education for All Handicapped Children Act does not require a state, through its local educational district, to provide each handicapped child with the best education for him." In *Susan B. v. School District of Omaha*,²¹ the state educational agency indicated that not only is maximization not required, but that Congress constitutionally cannot require handicapped children to be provided with maximum effort to the disregard of the educational opportunities provided nonhandicapped children.

However, in *Hines v. Pitt County Board of Education*,²² the court ordered an "age appropriate" placement because it would "more appropriately

meet" the child's needs, thereby suggesting that maximization may be required by that court.

In *Kruehle v. Biggs*,²³ the court said that the concept of a free appropriate public education is flexible enough to take into consideration the changing needs of a child. For example, while residential placement may be presently required for a particular student, it may not be required in future years.

Lack of funds, per se, is not a defense to a school district's failure to provide a free appropriate public education.²⁴

In *Rowley*, parents of a deaf child brought an action to have their daughter provided with a sign language interpreter in the classroom. In ruling that maximization is not required, the court stated that

An 'appropriate education' could mean an 'adequate education' -- that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential. Between these two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the equal protection decisions . . . and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.²⁵

Likewise, the language of the Act indicates that only a beneficial program, rather than the most beneficial program, is required. In *Krawitz v. Kline*,²⁵ the parents of a handicapped child sought an out-of-state residential placement for their child, claiming that an out-of-state placement was the most effective. In denying their claim, the court found "nothing in the statutes or regulations which requires the approval of a 'more appropriate' program when an appropriate educational program exists."²⁷

In the definition of "related services," only those services that are necessary to "assist a handicapped child to benefit from special education." are required.²⁸ Thus, it would appear that while the parents of a handicapped child may advance the argument that a particular item is necessary in order to maximize the child's development in one area or another if the state's standards do not require maximization, neither does the Act.

In the final analysis, the degree to which states and school districts can

successfully defend claims by handicapped children and their parents for programs which differ in quality and kind from those which the states and school districts are willing to provide, will in a large measure depend upon the degree to which hearing officers and the courts can be persuaded that the statutory definition of a free appropriate education, while admittedly vague, is still based upon several concrete principles that provide a more than adequate means of giving substance to the statute. First, and foremost, state standards must be effectuated, subject to the constitutional guarantees of equal protection. If this point can be successfully advanced, states and school districts should be able to service adequately the interests competing for their resources.

SELECTED ISSUES

Year-Round Programming

One of the most significant questions still being decided under the Act involves year-round programming. Obviously, if year-round programming is mandated, the costs of educating the handicapped would escalate tremendously. It has been estimated that year-round programming could increase educational costs across the nation by a billion dollars annually.

In *Armstrong v. Kline*,²⁹ several severely handicapped children brought a class action suit on behalf of themselves and a class of handicapped students who "required" year-round programming. The plaintiffs claimed that they were entitled to year-round programming because of the nature and severity of their handicaps, which caused them to regress more than nonhandicapped children during breaks in their programming (such as the traditional eight-week summer recess) and because it took a substantial amount of time after each break to recoup their losses. They contended that they were on an educational treadmill and were not able to benefit as much as they might otherwise. The Commonwealth of Pennsylvania and the defendant school districts argued that state standards required only 180 days of instruction, and that under those standards, all handicapped children could obtain an appropriate program.

In granting plaintiffs' claims, the district court reasoned that the Act required an educational program to meet each handicapped child's "unique needs," which are defined in the context of achieving the goals of the Act and that these goals are to insure self-sufficiency and independence from caretakers to the greatest extent possible. The court expressed its rationale as follows:

The Act appears to demand that the state supply instruction designed to meet all of the handicapped child's 'unique needs' without limitation . . . To determine which unique

needs of the handicapped child must be met . . . , it is useful to approach the problem by asking what is the goal of the education that the Act requires the state to provide . . . The congressional intent was to provide for that education which would leave these children, upon school's completion, as independent as possible.³⁰

On appeal, the circuit court essentially held that a blanket prohibition of educational programs in excess of 180 days violates P.L. 94-142 because it prevents the giving of individual attention to each handicapped child's needs. However, the court made clear that only the severely and profoundly impaired and the severely emotionally disturbed would qualify for programs in excess of 180 days.³¹ The Supreme Court has denied a petition for certiorari in the case.³²

In *Georgia Association of Retarded Citizens v. McDaniels*,³³ the federal district court refused to vacate the 180-day rule in Georgia on the basis of a factual finding that skills lost during interruptions in programming are recoverable within a reasonable time. Similarly, in *Anderson v. Thompson*,³⁴ summer programming was denied where a student progressed from year to year and regression at breaks in programming was not irreparable.

Although it is suggested that the *Armstrong* court erred in other contexts, year-round programming may be properly ordered by hearing examiners or the courts. This would occur wherever state standards authorized or required such programming. As indicated previously in this paper, a "free appropriate public education" is defined in the context of state standards; and it would consequently be difficult, if not impossible, to argue successfully that year-round programming was not required under P.L. 94-142 where it was required under state standards.

An additional context in which year-round programming could conceivably be properly ordered by the court would be where it was required by equal protection. The discretion that states possess under P.L. 94-142 to establish their standards is limited by the equal protection clause. Therefore, if a handicapped student could show that an educational program confined to the traditional school year did not enable the child to benefit, then that program would not pass muster constitutionally. However, it is suggested that rarely, if ever, will a handicapped child be able to establish such a fact. For example, in *Armstrong*, several of the named plaintiffs were severely and profoundly handicapped. Counsel for the plaintiffs was experienced, thorough and well-financed. Well-qualified experts were retained by and testified for the plaintiffs. However, the plaintiffs were unable to prove, and the *Armstrong* court notably did not find, that any child was unable to benefit from a 180-day program. On the contrary, the essence of the testimony was that all of the plaintiffs, even the most severely handicapped, benefitted in some measurable and recognizable way from a 180-day program.

Another case involving year-round programming is *Mahoney v. Administrative School District No. 1*.³⁵ The issue in *Mahoney*, however, was somewhat different from that in *Armstrong*. In *Armstrong*, the plaintiffs claimed that a 180-day program was appropriate. In *Mahoney*, however, the school district willingly conceded that the child required year-round placement, but argued that the district was not responsible for the entire cost of the program. Rejecting that argument, the court held that once it is determined that a particular program is appropriate, the states and school districts are responsible for underwriting the entire cost of the program. The lesson to be learned from *Mahoney*, apparently, is that once appropriateness of a program is conceded, other defenses, such as financial ones, will fail.

In the *Matter of George Jones*,³⁶ also involved year-round programming. As in *Mahoney*, all parties conceded that year-round programming was required, the only issue being who would pay for it. Basing its decision exclusively on state law, the court held that the state and school district were to assume the entire cost of the program.

Before passing from this issue, it is perhaps appropriate to indicate why the experts in *Armstrong* felt that year-round programming was required. Interestingly, they were not uniform in their opinions. One testified that any student that needed physical therapy needed year-round programming. Another testified that children who have not developed a "real image of themselves" or who exhibited abusive sexual behavior need year-round programming. A third testified that some handicapped students needed year-round programming because they needed as much peer interaction as possible. Perhaps most shockingly, from the context of the proper mission of the public schools, is the testimony of a fourth expert who indicated that year-round residential placement is necessary where there is a possibility of child abuse or danger to the family. None of the experts in *Armstrong* testified that year-round programming was necessary from an educational standpoint. It is suggested that the schools have not been designed to cure the problems about which these experts spoke: to the extent that the courts fail to recognize this fact, the basic mission of the public schools will inevitably be altered.

Residential Placement

Quite often, the dispute over the appropriateness of a particular program centers upon the location of the program, i.e., a dayschool setting or a residential setting. Oddly enough, neither parents nor school uniformly take one position or the other on this issue, and the relevant rules may be double-edged swords. Often, for both selfish and non-selfish reasons, parents want their child placed in a residential setting, even though an appropriate program can be provided in a dayschool. When a dispute arises, it is frequently because the school is concerned about the extra expense of

residential placement. On the other side of the coin, parents may demand a dayschool placement where the nature of the handicap makes such a placement highly impractical, if not inappropriate. In this situation, from the school's standpoint, the impracticality of the matter usually outweighs the extra cost of the residential placement.

Generally, the Act mandates "mainstreaming" or placement in the "least restrictive environment." In order to qualify for P.L. 94-142 funds, each state must establish

procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children from [a] regular environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.³⁷

Even where residential placement is required, mainstreaming nonetheless plays a part. Both §504 and P.L. 94-142 regulations require that where residential placement is appropriate, states must nonetheless insure that handicapped persons participate with nonhandicapped persons in nonacademic and extracurricular activities to the maximum extent possible.³⁸

Necessarily, the decision as to whether residential programming is required or "appropriate" in any given case under the foregoing rule of law is largely a question of fact. For example, in *Levy v. Department of Education*,³⁹ a dayschool program was rejected by the court in favor of a residential placement on the basis that the expert testimony illustrated that a dayschool placement "would be deleterious to [the child's] educational, social, and emotional well-being."⁴⁰

In *Riley v. Ambach*,⁴¹ the state of New York determined that children with specific learning disabilities could not be eligible for residential placements because a learning disability was a "mild" or moderate handicapping condition which did not require residential treatment. However, the plaintiffs proved to the satisfaction of the court that some learning disabled children may need residential placement. The court concluded that the blanket prohibition established by the State was violative of the Act, but did not indicate in any manner when residential placement would be required by the Act other than saying it was required "where appropriate."⁴²

Where residential placement is necessary, for educational reasons, the

program, including non-medical care and room and board, must be at no cost to the parents.⁴³ If an appropriate placement can be provided in a public dayschool, but the child's parents choose to place the student in a private residential program, the public school system is not required to pay any of the costs of the placement.⁴⁴ Furthermore, if residential care is necessary because of the student's home conditions, the public schools are not required to pay the costs of room and board, but only the costs of the educational program.⁴⁵ Also, it has been held that where parents place their child in a residential program but refuse to make their child available for an evaluation, the public school system is relieved of all obligation to pay for the child's schooling.⁴⁶

Although HEW attempted to delineate through its regulations under what circumstances parents or various state agencies were responsible for the costs of a residential placement, the benchmarks struck by HEW seem to erode when put to the test. In *North v. District of Columbia Board of Education*,⁴⁷ the parents had abandoned their child (who was epileptic, emotionally disturbed and learning disabled). All parties agreed that as a result of his various problems, the child was in need of a residential placement. However, the school district took the position that it was not responsible for the cost of the residential placement because the child's educational needs could be met by attendance at a special education day center. The school district argued that residential care was necessary only because of the child's emotional problems. In dismissing the school district's contention, the court quite clearly indicated that it would not attempt to draw the lines established in the P.L. 94-142 and §504 regulations:

It may be possible in some situations to ascertain and determine whether social, emotional, medical or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them.⁴⁸

The court also exhibited its dissatisfaction with the fight over financial responsibility between two state agencies because of the parents' abandonment of the child, saying that

it is unfortunate that the two agencies of the district having responsibility for plaintiff's care are seeking to shift the responsibility to each other--the Board of Education claiming that the plaintiff's problems are emotional, and the Department of Human Resources asserting

that it will not undertake to tend to his treatment without a formal finding that the parents have neglected him. It may be that the fault lies with the antiquated state of the District of Columbia laws; in any event, it is unfortunate that the assistance of this court had to be invoked under federal statutes to resolve what essentially are internal bureaucratic disputes.⁴⁹

Out-of-State Placements

There are no federal statutory or regulatory provisions specifically dealing with out-of-state placements and a similar dearth of federal case law on the subject exists. As a result, state statutes or regulations will have to be reviewed to determine when and to what extent out-of-state placements may be utilized.⁵⁰

Absent state standards to the contrary, the silence by both Congress and HEW would appear to allow out-of-state placements and, perhaps, even compel them in certain circumstances. Both §504 and P.L. 94-142 regulations prescribe that if a child is going to be removed from his or her regular class or building, the child must be educated as close to home as possible.⁵¹ Consequently, P.L. 94-142 may very well require a state to educate a child in an out-of-state institution which is five miles from the child's home, for example, rather than in an in-state institution which may be several hundred miles from the student's home, all other factors being equal.

Selection of Classroom or Building

It would seem that the selection of the school building in which to educate a handicapped child would not present a particular problem. The statutory and regulatory rules are straightforward and easily stated. Under P.L. 94-142 the only rule is that of mainstreaming.⁵² The Act's regulations provide three relevant rules: (1) handicapped children must be educated as close as possible to the child's home;⁵³ (2) if possible, they are to be educated in the school they would attend if not handicapped; and (3) in selecting the particular placement, potential harmful effects on the child or the quality of services must be considered.⁵⁴ However easily stated these rules may be, when disputes arise between school authorities and parents over the selection of a particular school, the questions can be quite perplexing.

In *Malcolm X. v. New York City Board of Education*,⁵⁵ the Second Circuit Court of Appeals held that educational placement refers to the type of program being offered, not the location, and that a change in location does not constitute a change in placement. In that case, the school district simply closed the school and transferred the students to other schools without any notice or prior hearing. The court concluded that the school district acted correctly. A petition for certiorari was denied by the Supreme Court.⁵⁶

In *In re Richard S.*,⁵⁷ the school district assigned an eleven-year-old, severely physically disabled, cerebral palsied child of normal intelligence to a normal school building in a neighboring school district. The particular building was selected because of its almost total lack of physical barriers, allowing the child to move about in his wheelchair as independently as possible. The child's parents, however, desired to have the child educated in the school to which he would have been assigned had he not been handicapped, a building with three floors and narrow, steep stairwells. Without making significant structural changes to the building, assigning the child to that building would have necessitated the employment of an aide with sufficient strength, coordination, responsibility and sensitivity to move the child and his wheelchair throughout the building. Such a plan would also risk injury or harm to the child or others if the child were to fall while being carried up or down the stairs. Importantly, it was found that the actual educational program to be provided at either school was appropriate.

In sustaining the parents' position, the hearing officer essentially held that P.L. 94-142 and §504 regulations prohibit the separation of a handicapped child from what would be his normal assignment solely by reason of the child's handicap.⁵⁸ It is suggested, however, that under the previously stated facts, the hearing officer erred in several respects. First, the Act mandates mainstreaming in general and not with respect to a specific school. In *Richard S.*, the child was attending normal classes in a normal school and was, therefore, mainstreamed. Second, by definition, "related services" are those which are "required to assist a handicapped child to benefit from education." In *Richard S.*, the hiring of the aide is not for the purpose of supplementing the educational program, but only to make a particular building accessible. The identical educational program could be provided at another location without the need for an aide. Third, having a child carried by an aide throughout the building not only calls more attention to the child's handicap and in a very real sense damages the child's self-image, but it obviously creates the potential for physical harm to the child, in violation of the regulations.⁵⁹

In contrast, the district court in *Pinkerton v. Moye*⁶⁰ held that in selecting a building for a particular program, school districts may look at various practical matters. For example, such things as finances, number of students needing a particular program, location, inconvenience, etc., may be taken into consideration in determining where to locate any particular special education program. Further, the court held, those factors take precedence over the general rule that a handicapped child should be educated in the school he would have attended if not handicapped.

In *Brown v. District of Columbia Board of Education*,⁶¹ five visually and hearing-impaired children were receiving special education in a self-contained academic program in a regular school building and were

integrated with nonhandicapped children to some degree during recess, breakfast, lunch and assemblies. After an evaluation of the program, school officials determined that the children needed additional supportive services not provided in the regular school building. It was therefore proposed that the children be transferred to a special school building where they could receive the additional services. The court held that such a change did not constitute a change in placement and, consequently, did not necessitate prior notice to parents. However, the court cautioned that where a change in location requires change in an individualized education program, parents do have a right to challenge the modification of the program.

Similar to *Brown* is *In re Education Assignment of Paul P.*⁶² In *Paul P.*, parents sought to have the child (cerebral palsied with little intelligible speech) placed in regular classes in a regular building. The school district, on the other hand, offered placement in a special education center. The school district's objection to regular school placement rested upon the fact that special services were needed to enable the student to participate in a regular class and that regular buildings were generally inaccessible because of physical barriers. In rejecting the school district's contentions, the Secretary held that P.L. 94-142 specifically requires that school districts provide those services needed for educational reasons and that "it is the responsibility of the district to provide or locate an accessible building . . ." (emphasis added). The Secretary did not order placement in the particular school the child would have attended had he not been handicapped and did not order special services for the purposes of overcoming physical barriers, as did the hearing officer in *Richard S.*

In *In re Educational Placement of Mark S.*,⁶³ the Secretary of Education specifically held what had been inferred in *Paul P.*: concluding that hearing officers lacked the authority to assign students to particular schools, holding that such authority rested exclusively with the school district. In reaching this conclusion, the Secretary stated that "the hearing officer's authority extends only to the 'type' of educational program which would be appropriate for the child. The school or classroom to which a child will be assigned is, therefore, we find, within the discretion of the district."

While states and courts grapple with the nuances of this issue, it appears that mainstreaming or least restrictive environment does not guarantee the placement of children in any particular school.

Disciplinary Suspensions and Expulsions of the Handicapped

Often when specific legislation is superimposed upon the existing public school structure, fundamental conflicts result. An example of such a conflict involves the unique procedural rights enjoyed by the handicapped and the rules generally governing student discipline.

It is fair to state that across the nation, public school students who misbehave in one fashion or another are subject to appropriate discipline, such as suspension or expulsion, consistent with due process.⁶⁴ However, these alternatives appear to be generally unavailable or extremely restricted with respect to the handicapped and, in some cases, those suspected of being handicapped.

In *Stuart v. Nappi*,⁶⁵ the school district scheduled an expulsion hearing pursuant to state law for a learning-disabled child who had a history of behavioral problems. In enjoining the school district from convening the expulsion hearing, the court held that P.L. 94-142 "established procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive."⁶⁶ In making this determination, the court relied principally upon the concept of least restrictive environment, which it felt might be

circumvented if schools are permitted to expel handicapped children. An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placement. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment.⁶⁷

The court also relied upon the prescriptions of P.L. 94-142 that placement decisions are to be made by professional teams and that parents are entitled to participate in and to appeal placement decisions.⁶⁸ Expulsions by a school board, in the courts' view, would be contrary to both concepts.

The court quickly noted, however, that school districts are not powerless in dealing with handicapped students who misbehave. The court cited with approval the regulations adopted under the Act and their comments which authorized school districts to use their "normal procedures for dealing with children who are endangering themselves or others."⁶⁹ (emphasis added). According to the court

handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspensions,

against disruptive handicapped children. Secondly, a [planning and placement team] can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children.⁷⁰

In *Louis R. v. Canzonetti*,⁷¹ a handicapped student was suspended for disciplinary reasons for a period of two months without a hearing. Indicating that such a suspension would violate P.L. 94-142, the court found that

another factor which must be considered by school authorities in suspending or expelling a handicapped youngster is 20 U.S.C. §1415(e)(3), which prohibits any change in the child's placement pending completion of the hearing process . . . This provision 'does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others.' 34 C.F.R. §300.513. The idea is to permit schools to deal expeditiously with students who are dangerous or to respond to an emergency situation. Temporary suspensions or removal from class could be effected utilizing the procedures . . . However, a permanent expulsion or change of placement would have to await completion of the procedures prescribed by the Handicapped Act.⁷²

In *S-1 v. Turlington*,⁷³ the school district expelled several handicapped students for alleged misconduct. In ordering the school district to readmit the students, the court expressly rejected the claim that a state's disciplinary procedures are totally independent of the rights of students under P.L. 94-142. The court also rejected the school district's alternative claim that the Act supercedes a state's disciplinary procedures only where the misconduct of the student is related to the child's handicap. In that regard, the school district unsuccessfully urged that misconduct would be related to a child's handicap only where, for example, the child is seriously emotionally disturbed, as opposed to physically handicapped. In rejecting this contention as being too simplistic and contrary to the Act's emphasis on individual treatment of the handicapped, the court noted that school boards would not have the expertise necessary to determine whether disruptive behavior was caused by the child's handicap.

However, the court's holding in *S-1* was not adopted by the court in *Doe v. Koger*.⁷⁴ In that case, the court held that a handicapped child is insulated from a school district's usual disciplinary procedures only where the disruptive behavior is related to the child's handicap. The court reasoned that

while 20 U.S.C. §1415 and its accompanying regulation (sic) do not provide for the expulsion of handicapped children, they do not prohibit the expulsion of handicapped children. While 20 U.S.C. §1412 and its accompanying regulations require schools to guarantee that handicapped students have the right to be educated, they do not require schools to guarantee that handicapped students be educated. It is the purpose of the Handicapped Act and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the student's handicap. It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble. For an appropriately placed handicapped child, expulsion is just as available as for any other child. Between a handicapped child and any other child, the distinction is that, unlike any other disruptive child, before a handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt.⁷⁵

The court in *Doe* was evidently in agreement with the court in *S-1* that school boards would not have the expertise to determine whether a child's disruptive behavior was caused by the child's handicap. Therefore, the court in *Doe* required that the P.L. 94-142 procedures be utilized to determine the cause of the child's disruptive behavior. If it is found through the utilization of such procedures that the child's handicap is not the cause of the disruptive behavior, school boards are free to pursue the ordinary disciplinary procedures.

A question has arisen in this area which is likely to be raised again: when do a child's rights under the handicapped laws attach so as to insulate the child from a state's disciplinary procedures. In *Mrs. A. J. v. Special School District No. 1*,⁷⁶ a student had repeatedly engaged in disruptive behavior over a course of months, and was appropriately disciplined. After several of these incidents, with the parents' approval, the school district initiated an evaluation process to determine whether the child was handicapped. After the evaluation process was instituted, but prior to its conclusion, the student was involved in a fight with another child and was suspended for fifteen days. The parents argued that the child was protected from the suspension on the basis of P.L. 94-142 and its regulations. In rejecting the parents' contention, the court held that the Act applied only to those children that have been properly evaluated and identified as handicapped. The court discounted the parents' claim that since the school district suspected the child of being handicapped (as evidenced by the evaluation process), the protections of P.L. 94-142 attached, stating that

schools are under a clear obligation to make the classification decisions through an exclusive formal process with the input of parent and child. The plaintiff's argument is simply incongruous, as to accept the plaintiff's assumption that school officials should have treated A. J. as a handicapped student based on the suspicions of the school officials would require the defendant to ignore and even violate federal and state law concerning the classification or identification of a child as handicapped and in need of special services.⁷⁷

This issue, unfortunately, is not as clear as it appears to be in *Mrs. A. J.* A good number of states are subject to court orders which, if not inconsistent with the Act in some areas, are different. For example, in *Lebanks v. Spears*,⁷⁸ the court's order provided that any child who was a disciplinary problem and who was "suspected" of possible retardation was entitled to special hearing rights. Similarly, in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*,⁷⁹ the consent decree prohibited students "thought by any school official" to be mentally retarded from being subjected to a change in educational status. Therefore, where a child is merely suspected of being handicapped, in some states at least, the extensive procedural and substantive rights of the handicapped may have to be recognized.

Despite the existence of some half dozen federal court decisions which ostensibly prohibit traditional disciplinary measures from being applied to the handicapped, except in emergency situations, it is nonetheless suggested that where it is obvious that a handicapped student's misbehavior is unrelated to the child's handicap, school officials can deal with the child as they would any other. To consider an extreme case, a blind child who is selling marijuana on school grounds should be subject to appropriate discipline outside of the unique procedures which were established by P.L. 94-142. The student's exceptionality should not serve to insulate the student from the traditional disciplinary procedures.

One question not yet answered involves those situations where handicapped children have been improperly placed in regular classrooms, and, while not endangering themselves or others in the context understood by the courts in *Stuart* and *Louis R.*, are seriously disrupting on a daily basis the educational program being offered to other children in the class. It would seem that a school district's utilization of the unquestionably slow placement procedures of P.L. 94-142 would seriously harm, from an educational standpoint, those other students. It would also appear that school officials would be ill-advised to maintain the student in the classroom pending the outcome of such proceedings. But there appears to be some risk to school

officials, in view of the court's decisions already discussed, if they should remove the handicapped child from the normal classroom.

Perhaps a way to resolve the problem is to provide automatic alterations in the educational program in both the state standards applicable to the handicapped and in the individualized educational programs of each handicapped child. In other words, incorporated in the plan for each student, either expressly or through the incorporation of relevant state standards, could be placement directives to take effect should certain conduct be exhibited by the child. Analogous to a handicapped child who is automatically promoted to a higher level after mastering certain skills, a handicapped child who regresses in terms of behavior should properly be subject to an appropriate modification. Such an approach may provide a vehicle by which states and school districts can avoid situations like *Stuart*.

State of the Art Education

In *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania*,⁸⁰ plaintiffs initiated a court action essentially seeking the court to compel "state of the art" special education. Among other things, plaintiffs asserted that students have the right to be educated in age appropriate classes, in age appropriate schools, by teachers trained in the latest techniques; that careful study should be made of each individual child to determine exactly the propriety of any instructional technique; that parents be trained to determine what should be provided so that if anything less is provided appropriate claims can be made; and that instruction be given in "natural" environments so that there is no problem with the student's transferring skills to other environments. Most significantly, the case challenges the special education program in the Philadelphia School District, alleged to be one of the best in the nation. Consequently, if the Philadelphia special education program is held to be deficient in those areas, there will be immediate and nationwide impact.

CONCLUSION

Despite the tens of thousands of handicapped students that have been placed since the effective date of P.L. 94-142, this area of the law is still in its infancy. While higher courts decide whether and to what extent the district courts are affirmed in this area, states and school districts, confronted with increasing costs, may do best by stressing the concept of local control and downplaying the notion of maximization.

FOOTNOTES

- 1 O.W. Holmes, *The Path of the Law*, Collected Legal Papers, 167, 173 (1920).
- 2 29 U.S.C. §794 and 20 U.S.C. §1401 *et seq.*, respectively. The discussion contained in this paper will focus primarily on P.L. 94-142. Because §504 and the regulations adopted thereunder deal exclusively with the elimination of discrimination, their specific mandates are largely fact dependent and are likely to vary from state to state. Generally, the more educational services provided to the non-handicapped, the more that must be provided to the handicapped under §504. Where that section or its regulations have some bearing upon the issues herein discussed, their relevance will be noted.
- 3 20 U.S.C. §1401(18). The regulations promulgated under §504, on the other hand, define a free appropriate public education somewhat differently and in the context of the quality of educational opportunity provided by each state or school district. The language of the regulation states that:

for the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and service that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §104.34, §104.35, and §104.36 (relating to due process hearing). (34 C.F.R. §104.33(b)).

- 4 20 U.S.C. §1401(16).
- 5 20 U.S.C. §1401(17).
- 6 One court, possibly inadvertently, said that "the Act does not define appropriate education." *Rowley v. Hendrick Hudson Central School District*, 483 F. Supp. 528 (S.D.N.Y. 1980).
- 7 Note: *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv.L.Rev. 1103 (1979). In *Mahoney v. Administrative School District No. 1*, ___ Ore. App. ___, 601 P.2d 826 (1979), the court said that "the programmatic provisions of the Act are open-ended and much definition is left to the states. . . [I]t may be the case that Congress intended to leave the

definition of 'appropriate' education sufficiently loose to enable local legislative and school officials to make appropriate programmatic decisions and to adapt those decisions to individual cases." *Id.* at 829.

- 8 483 F. Supp. 528 (S.D. N.Y. 1980), *petition for cert.* filed December 15, 1981, Docket # 80-1002.
- 9 476 F. Supp. 583 (E.D. Pa. 1979), modified *sub. nom* Battle v. Kline, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom* Scanlon v. Battle, ___ U.S. ___, 101 S. Ct. 3123 (1981).
- 10 The legislative history is replete with evidence that Congress has traditionally been committed to the preservation of local control over public education. For example, this commitment was expressed in 1965 by Congress as follows:

It is the intention of the proposed legislation [the Elementary and Secondary Education Act, P.L. 89-750, one of the precursors to P.L. 94-142] not to prescribe the specific types of programs or projects that will be required in school districts. Rather such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from state to state and district to district. . . . There may be circumstances where. . . the best approach in meeting the needs of educationally deprived children would be to up-grade the regular programs. 1965 U.S. Code, Cong. & Admin. News, 89th Congress, p. 1454.

Similarly, in a House Report in the 1966 Amendments to the Education and Secondary Education Act, the committee expressed its "gratitude" to find that "flexibility and local discretion is a keynote in the administration of" the Education Act. 1966 U.S. Code, Cong. & Admin. News. p. 3863.

- 11 20 U.S.C. §1401(18) (B).
- 12 Note: *Enforcing the Right to an "Appropriate Education."* 92 Harv. L.Rev. at 1109.
- 13 629 F.2d 269 (3d Cir. 1980).

- 14 In *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (relating to inter-district remedying of segregation), the court said:

No single tradition in public education is more deeply rooted than local control over the operation of school; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process. . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation, and a healthy competition for educational excellence'. (citations omitted)

See also *San Antonio School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973).

- 15 In *San Antonio Independent School District v. Rodriguez*, *supra*, the Texas school financing system survived an equal protection attack because it provided "each child with an opportunity to acquire the basic minimal skills" even though it created an environment in which some students benefitted more than others. In *Frederick v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976), the court held that an equal protection claim was stated because the plaintiffs alleged that they could not "derive any educational benefits" from the program they were being provided. *Id.* at 835 (emphasis in original) In *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975), the court held that an equal protection claim was stated when the plaintiffs alleged "that their children are being denied educational opportunities," noting that "there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education." *Id.* at 958. Similarly, in *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973), the court noted that "a state is not constitutionally required to provide the mentally retarded with a certain level of special education." *Id.* at 763. In *Sherer v. Waier*, 457 F. Supp. 1039 (W.D. Mo. 1977), a motion to dismiss by the defendants was sustained because "the complaint [did] not allege that the defendants have denied plaintiff Kimber Sherer any education, but rather that defendants have refused to provide special services to her." *Id.* at 1047-1048. In *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), the court said that "[t]he equal protection clause does not require a state to guarantee more education to students with a greater need of education." *Id.* at 230. Finally, in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), the court held that if insufficient funds were available to fund optimally both regular and special education programs, equal protection

simply prohibited states from burdening the handicapped with a disproportionate share of the cutbacks.

- 16 In Senate Report No. 94-168, it was noted that P.L. 94-142 was enacted in the belief "that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." 1975 U.S. Code, Cong. & Admin. News, 94th Congress, p. 1433. That Senate Report also stated that P.L. 94-142 was developed because Congress "recognizes the states' primary responsibility to uphold the Constitution of the United States and their own state constitution and state laws as well as Congress' own responsibility under the fourteenth amendment to assure equal protection of the law." *Id.* at 1446. Further support for the constitutional foundation of P.L. 94-142 is found in the report's discussion of discriminatory treatment, wherein it was said that "it is this [unconstitutional] discriminatory treatment and exclusion which court cases, state and federal laws are designed to remedy." *Id.* at 1451.
- 17 20 U.S.C. §1401. As was noted in *Ex parte Virginia*, 100 U.S. 339 (1879), "Congress is authorized to enforce the prohibitions [of the fourteenth amendment] by appropriate legislation. Some legislation is contemplated to make the amendments [to the Constitution] fully effective." See also *Katzenbach v. Morgan*, 384 U.S. 641 (1966), where the court held that the Voting Rights Act of 1965 was enacted to enforce the fourteenth amendment.
- 18 *Rowley v. Hendrick Hudson School District*, *supra*; *contra*, *Armstrong v. Kline*, *supra*.
- 19 Senate Report No. 94-148 clearly states that "[t]he committee recognized that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." 1975 U.S. Code, Cong. & Admin. News, 94th Cong., p. 1435. Such was the intentional design of Congress, as all language to the contrary was stricken from the bill. "The committee had deleted the language of the bill as introduced which required objective criteria and evaluation procedures by which to assure that the short term instructional goals were met." *Id.* at 1436. Congress further refused to mandate pre-school education to the handicapped, 20 U.S.C. §1412(a)(B), despite its recognition that maximizing educational benefits, especially with reference to the handicapped, requires pre-school education.

The committee heard testimony which indicated strongly that special education services provided to handicapped children before 'normal' school age were often the most

beneficial, since much more could be done at an early age to ameliorate, alter or develop skills to compensate for certain handicapping conditions. *Id.* at 1479.

If it were Congress' purpose to maximize results, or indeed to mandate any specific end result of special education, it could have easily expressed that intent as it did in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*, which provides, *inter alia*, that "[t]he treatment, services and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of that person . . ." 42 U.S.C. §6010(2).

Lastly, consistent with the thought that a certain level of achievement or advancement was in no way guaranteed by the statute or regulations, the Department of Health, Education and Welfare, in its regulations administering education programs for the handicapped, expressly provided that "no agency, teacher or other person may be held accountable if a child does not achieve the growth projected in the annual goals and objectives." 34 C.F.R. §300.349.

- 20 494 F. Supp.266, 272 (W.D. Ark. 1980).
- 21 Nebraska SEA Decision No. 79-03, 3 EHLR 502:104 (May 23, 1980).
- 22 497 F. Supp. 403, 407 (E.D.N.C. 1980).
- 23 489 F. Supp. 169 (D. Del 1980).
- 24 497 F. Supp. at 408.
- 25 483 F. Supp. at 534. See also *Fitz v. Intermediate Unit 29*, ___ Pa. Common. ___, 402 A.2d 138 (1979).
- 26 ___ Pa. Common. ___, 408 A.2d 1202 (1979).
- 27 *Id.* at 1205.
- 28 20 U.S.C. §1401(17) (emphasis added).
- 29 476 F. Supp 583.
- 30 *Id.* at 602-04.
- 31 629 F.2d 269, 274 (3d Cir. 1980).
- 32 ___ U.S. ___, 101 S. Ct. 3123 (1981).

- 33 ____ F. Supp. ____, (N.D. Ga. 1979), ____ EHLR 551:215.
- 34 495 F. Supp. 1256 (E.D. Wis. 1980).
- 35 ____ Ore. App. ____, 601 P.2d 826 (1979).
- 36 98 Misc. 2d 562, 414 N.Y.S. 2d 258 (1979).
- 37 20 U.S.C. §1412(5)(B). Essentially, both the §504 regulations, 34
C.F.R. §104.34(a), and the P.L. 94-142 regulations, 45 C.F.R. §300.132
§300.550-.553, track this statutory provision.
- 38 34 C.F.R. §104.34(b).
- 39 ____ Pa. Common. ____, 399 A.2d 159 (1979).
- 40 *Id.* at ____, 399 A.2d at 163.
- 41 508 F. Supp. 1222 (E.D.N.Y. 1980).
- 42 *See also* Kruelle v. Biggs, 489 F. Supp. 169 (D. Del. 1980), following
North v. District of Columbia, 471 F. Supp. 136 (D.D.C. 1979).
- 43 34 C.F.R. §300.302, 34 C.F.R. §104.33(c)(3).
- 44 34 C.F.R. §104.33(c)(4), 34 C.F.R. §300.403.
- 45 Comments to §504 regulations, 42 Fed. Reg. 22691 (May 4, 1977).
- 46 Welsch v. Department of Education, ____ Pa. Common. ____, 400 A.2d 234
(1979).
- 47 471 F. Supp. 136.
- 48 *Id.* at 141.
- 49 *Id.*
- 50 *See, e.g.*, 22 Pa. Code §13.12.
- 51 34 C.F.R. §300.552(a)(3), 34 C.F.R. §104.34(a).
- 52 20 U.S.C. §1412(5)(B).
- 53 *But see* In re the Education of Assignment of Elliot S., Appeal Opinion
No. 86 (Secretary of Education, Commonwealth of Pennsylvania, 1978),
wherein the Secretary of Education held that closeness to home is only

one factor among many to consider and that as between two schools, when an appropriate program cannot be provided at the closer school, the concept is irrelevant.

- 54 34 C.F.R. §300.552(a) (3).
- 55 629 F.2d 751 (2d Cir. 980).
- 56 ____ U.S. ____, 101 S.Ct. 858 (1981).
- 57 Iowa SEA Decision (1979).
- 58 The presiding officer's conclusion that §504 prohibits different treatment of an individual solely by reason of a handicap is somewhat at odds with the court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979), wherein it was held that if a particular handicap renders an individual unqualified for a particular program, then that individual may be excluded for that reason alone.
- 59 34 C.F.R. §300.552(d).
- 60 509 F. Supp. 107 (W.D. Vir. 1981).
- 61 Civil Action No. 78-164G (D.D.C. 1978).
- 62 Pennsylvania SEA Decision No. 114 (1978).
- 63 Pennsylvania SEA Decision No. 134, 3 EHLR 501:399 (December 13, 1979).
- 64 *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975).
- 65 443 F. Supp. 1235 (D. Conn. 1978).
- 66 *Id.* at 1242.
- 67 *Id.* at 1242-1243.
- 68 *See* 34 C.F.R. §300.533(a) (3); 34 C.F.R. §300.345; 20 U.S.C. §1415(b) (1) (C).
- 69 443 F. Supp. at 1242. *See also* the comment to 34 C.F.R. §300.513.
- 70 *Id.* at 1243.
- 71 ____ F. Supp. ____ (D. Conn. 1979).
- 72 Slip Opinion at 17-18.

- 73 3 EHLR 551:211 (S.D. Fla. 1979), *aff'd*, 635 F.2d 342 (5th Cir. 1981),
petition for certiorari filed April 22, 1981, Docket No. 80-1770.
- 74 480 F. Supp. 225 (N.D. Ind. 1979).
- 75 *Id.* at 229.
- 76 478 F. Supp. 418 (D. Minn. 1979).
- 77 *Id.* at 432.
- 78 60 F.R.D. 135 (E.D. La. 1973).
- 79 343 F. Supp. 279 (E.D. Pa. 1972). See also *Mills v. Board of*
Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).
- 80 Civil Action No 71-42.

DISCIPLINING THE HANDICAPPED STUDENT:
TRENDS UNDER P.L. 94-142

By: Patricia W. Morrison

In 1975 Congress enacted the Education for All Handicapped Children Act, (hereafter the Act or P.L. 94-142).¹ The purpose of this legislation was to encourage every school district throughout the country to provide an appropriate education for every child regardless of the severity or nature of that child's handicap. For too long, local schools had rejected severely mentally retarded youngsters as incapable of learning or the severely physically impaired as too ill to attend school. The new law not only required programs for these children, but further mandated that the program be in the "least restrictive environment."² This mandate has been translated in practice to mean that the handicapped be educated with nonhandicapped students as much as possible. In short, a youngster under P.L. 94-142 cannot be excluded from school simply because of his handicap.

Most of us, like Congress in 1975, can accept the general theory of P.L. 94-142. The problem arises when educators are confronted with a particular child and particular circumstances. Where is the line drawn between accommodating the needs of the handicapped pupil and the requirements of the school system?

Nowhere is this dilemma more clearly defined than in the area of discipline. Consider the case of the handicapped boy, who, for example, has just been caught fighting in school. Can he be disciplined? Suspended? Expelled? Increasingly these questions are being addressed by administrators, arbitrators and courts, and an answer is gradually emerging. This paper will review these decisions and suggest a procedure for school districts to follow.

GOSS V. LOPEZ

The problem arises because of a potential conflict between the due process rights guaranteed to all school children established by *Goss v. Lopez*,³ and the elaborate procedural protections afforded handicapped students under federal and state law.

The *Goss* case involved students who were suspended from school for ten days without a hearing. They alleged this suspension abridged without due process their constitutional right to an education (as provided by state law).

The court found the ten-day suspension violated a liberty and property interest substantial enough to warrant constitutional protection. It then proceeded to define what is required before a school district may suspend a student. The minimal procedure identified by the court was "that the student be given oral or written notice of the charges against him and, if he denies

them, an explanation of the authorities' evidence and an opportunity to present his side of the story."⁴

The court further allowed for removal without a hearing in emergency situations and called for more formal procedures for longer suspensions or expulsions.

It is important to note that the focus of the disciplinary due process hearing is not whether the school district has authority to discipline the child through the use of suspensions or expulsions, but whether the student is guilty of what he is alleged to have done. There is no question that a school district has such authority.

STUART V. NAPPI

The first widely reported case involving discipline of the handicapped is *Stuart v. Nappi*.⁵ Kathy Stuart, the plaintiff, was a junior in high school when she was expelled for her participation in a school-wide disturbance. Her school records indicated a history of behavioral problems and recommended assignment to special education classes. However, Kathy had not attended these programs. Now, through counsel, she sought an injunction to prohibit her expulsion.

Counsel took the position that regardless of what Kathy had done, she could not be expelled because she was handicapped. Under the Act, she was entitled to a full due process review of her educational placement. Expulsion was not a proper alternative. The school district, on the other hand, believed that the student's rights were satisfied if she were given a disciplinary hearing as mandated by *Goss*.

The court in *Stuart* did not extend the *Goss* line of thought. Instead it agreed with the handicapped student. First, the court determined that Kathy had a right under the Act to "an appropriate education." Since the school system had not followed its own recommendation that Kathy be placed in a learning disability program, her rights had been violated.

Secondly, Kathy claimed a right to remain in her present placement until her special education complaint was resolved. Her claim was based on the statutory language of P.L. 94-142 which provides that "during the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . until all such proceedings have been completed."⁶

If Kathy were allowed the benefit of this section of the Act, then the disciplinary value of an expulsion would be nugatory. The statutory appeal process for a change in placement could take years. By the time an expulsion

would be served, assuming it was held appropriate, Kathy would be out of school.

The court recognized a potential conflict between the protection afforded the handicapped child and the disciplinary process. However, the court found the potential conflict resolved by the regulations which permit a school "[to use] its normal procedures for dealing with children who are endangering themselves and others."⁷

The court construed this language to mean that a district could use its regular procedures to deal with an emergency, but could not expel a handicapped child while a special education complaint was pending. Under the court's analysis, a limited suspension to protect the child or others would be acceptable, but a punitive expulsion would not.

Next, plaintiff claimed that she could not be expelled even after resolution of her special education complaint, because an expulsion was contrary to the mandate of the Act, which requires that handicapped children be educated in the "least restrictive environment." Again, the court agreed, finding that the Act prescribes a procedure to place the disruptive child in a more restrictive environment based on the assessment of a professional team. This procedure in essence preempts for the handicapped youngster the normal disciplinary procedure.

The court concluded that its decision adequately protected the school board's interest in maintaining discipline by giving it the short-term solution of suspending a disruptive handicapped child for as long as he was dangerous, and the long-term remedy of changing the student's special education placement through the appropriate special education procedures.

What the *Stuart* court failed to account for was the lengthy appeal process which negates the practicality of a change in placement if the change is challenged. Nor did the court provide for the use of suspension or expulsion as a disciplinary technique per se. Nonhandicapped students are routinely put out of class when their misconduct becomes intolerable on the theory that denying attendance is sufficient penalty to correct the behavior. The *Stuart* court's decision does not permit this disciplinary approach.

CASES SINCE STUART

Cases since *Stuart* have refined its analysis to prohibit expulsions of handicapped children unless the interdisciplinary placement team determines that the expulsion is appropriate to the student's educational needs,⁸ but to allow the school to remove a handicapped child when his kicking and hitting disrupts the class.⁹ Experience has not, however, resolved the conflict between disciplinary expulsions which must be immediate to be effective and the elaborate appeal rights required for a placement committee review.

Several courts have wrestled with those issues, however, and their analyses are instructive.

First the district court of northern Indiana in *Doe v. Koger*¹⁰ dealt with a mildly mentally retarded youngster who was suspended and expelled for disciplinary reasons. The child appealed and requested a placement hearing under the state regulations.

The court reviewed the Act and concluded that it was the intent of Congress in enacting the law "to prohibit districts from expelling students whose handicaps cause them to be disruptive."¹¹ But the court did not terminate its analysis there. Rather, it distinguished the case of the child whose handicap causes him to be disruptive from the handicapped child who is disruptive for other reasons. In the latter case, the school may discipline the child:

It is the purpose of the Handicapped Act and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the students' handicaps. It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the student's will to cause trouble."¹²

The court held that the placement procedures of the Handicapped Act should be used to determine whether the student's misconduct was caused by his handicap. When that is the case, the child's placement may be adjusted if a more appropriate assignment is required. However, if the original placement is appropriate, the child may be expelled according to regular procedures.

This case is interesting because it also discusses the constitutional equal protection claim that a handicapped child is being denied his right to an education if he is expelled. The court found no fundamental right at issue and no unequal treatment. Since both handicapped and nonhandicapped students were treated the same under the disciplinary procedures, there could be no invidious discrimination. The equal protection clause does not require that the particular class receive superior treatment, but only that they be treated the same.

In sum the *Doe* court recognized the legitimate disciplinary value of an expulsion when the handicap is not at issue. The *Doe* court, however, did not resolve the problem of the appeal rights. *Doe* requires the convening of the placement team, the actions of which can be challenged and appealed. Once the due process rights of the handicapped attach, as they do in *Doe*, the disciplinary value of the expulsion is, for all practical purposes, lost.

The Court of Appeals for the Fifth Circuit addressed these issues in *S-1 v. Turlington*¹³ when nine Florida school children appealed their expulsions under the Act and §504 of the Rehabilitation Act.¹⁴ The expulsions were for the maximum period permitted by Florida law--the remainder of the current school year and the entire succeeding year. All of the students were handicapped with mental retardation; none were classified as behavioral problems. All were given *Goss* type due process protections.

The first issue considered by the court was whether an expulsion is a change in placement invoking the procedural protections of the Act and §504. The court followed *Stuart v. Nappi*, and *Doe v. Koger* and held that it was. The concern which the Fifth Circuit found persuasive on this point was that failure to require the protections of P. L. 94-142 would allow districts to circumvent the explicit mandates of the act by simply expelling handicapped children.¹⁵ To prevent the abuse of the expulsion process the court required review by a placement team.

The second issue raised in the *S-1* case addressed the concern of school officials that the special treatment given handicapped students meant that such a child could never be expelled because no placement team would recommend expulsion as a proper placement. The Fifth Circuit held that a double standard was not created because a handicapped student could be expelled if the misconduct was not related to the handicap.

The third issue related to who has the burden of raising the question of whether the misconduct is the result of the handicap. The court held that the responsibility fell on the schools because of the "remedial purposes of these statutes."¹⁶ Parents could not be expected to know that they had the right to make this challenge to the expulsion.

The fourth issue dealt with the rights of students who withdrew after they were expelled. Were they still entitled to due process hearings? Again the court ruled in the students' favor because the statute made no provision to the contrary.

In sum, the Fifth Circuit ruled that the school district had the duty not only to observe the rights of the handicapped students, but also to assure that they were given every opportunity to raise those rights and act upon them.

LESSONS FROM CASE LAW

What do these cases teach in terms of disciplining the handicapped child? First, they teach that suspension or expulsion is a change in placement and cannot be accomplished without the due process protections of the Education for All Handicapped Children Act. Second, they teach that the placement committee, rather than the *Goss* decision-maker, must determine if the

misconduct is a manifestation of the handicap. In some jurisdictions, if the two are not related, the child may be suspended or expelled.¹⁷ In other jurisdictions a handicapped child may be disciplined, but never expelled.¹⁸ But, if the misconduct is a manifestation of the handicap, all jurisdictions agree that the placement can be changed only if the change is required by the educational needs of the child.

Third, the cases teach that the school bears the burden of raising the issue whenever a handicapped child is the subject of a disciplinary exclusion. Fourth, they teach that these rights attach as soon as a child requests a handicap evaluation. Presumably any expelled student could raise the question and avoid the expulsion at least until the question of his having a handicap is resolved.

Finally the cases teach that if a handicapped student poses a danger to himself or others, he may be removed from class temporarily without elaborate due process proceedings. However, this removal must be brief; as soon as the danger is past, there is no reason for the child's absence. If the student is an ongoing threat, the remedy is a more restrictive placement, not a disciplinary exclusion.

In order to minimize successful challenges to its disciplinary process, each school district should develop a policy for disciplining handicapped pupils, especially when the discipline involves suspension or expulsion. Because discipline is primarily a matter of local discretion subject to state law, each district must create its own procedure. However, the following factors might be considered.

1. When developing the IEP for a handicapped student, the multi-disciplinary team might include as one of the teaching techniques the use of exclusion as a disciplinary tool. Then, should a suspension or expulsion become necessary, the district would argue that it was part of the IEP rather than a change in placement.
2. In the alternative, every disciplinary case should be checked to determine if the student is handicapped. When a student who is the subject of discipline has been identified as handicapped, the placement team should be convened to determine whether the alleged misconduct is a manifestation of the handicap.
3. If the team determines that the misconduct is related to the handicap, suspension or expulsion is not permitted. Instead, the team should determine if the current placement is appropriate or if a change is

required. If a change is recommended, the standard procedures for a change in placement should be followed. If a change is not recommended, the team should adjust the IEP to cope with the prevention of and response to such misconduct in the future. These decisions are all subject to challenge by the parents and, pending appeal, no change can be made in the student's placement.¹⁹

4. If the placement committee determines that the alleged misconduct is not a manifestation of the handicap, the student may be suspended or expelled pursuant to a *Goss v. Lopez* hearing. This procedure is not subject to the automatic restriction of no change pending an appeal, although in a particular case a plaintiff may seek an injunction to postpone the exclusion until completion of the appeal process. While parents may contend that the initial decision of the placement team is subject to the Act's appeal rights, the district can argue that those protections attach only to the extent that the child is being treated differently because of his handicap. Since the handicapping condition is not involved in this matter, P.L. 94-142 does not apply.

Admittedly, these procedures make the discipline of a handicapped child burdensome. but courts which have decided the issue have all required special proceedings for this protected class. Their rulings may not be precedent in your jurisdiction and other courts may reach different conclusions. However, the current trend is to make, quite literally, a potential federal case out of every disciplinary decision involving a handicapped student. For the moment there is no other alternative.

POST SCRIPT

The cases discussed are based on P.L. 94-142. Today, the future of that Act under the Reagan administration is uncertain. It has been targeted for repeal. Would repeal make any difference in disciplining the handicapped? Schools would still be subject to state law and §504 of the Rehabilitation Act. Section 504 does not give handicapped students preferred status; under that act they could be expelled as are non-handicapped students.²⁰ But under state law, handicapped students may get special treatment. Again several threshold questions need to be asked. Is the disciplinary action a change in placement? Is the misconduct a manifestation of the handicap? Who has the burden of proof? Repeal of P.L. 94-142 will shift the forum; it will not resolve the issues.

FOOTNOTES

- 1 20 U.S.C. §1401 *et seq.*
- 2 20 U.S.C. §1412(5) (B) ; 34 C.F.R. §300.550.
- 3 419 U.S. 565 (1975) .
- 4 *Id.* at 581.
- 5 443 F. Supp. 1235 (D. Conn. 1978) .
- 6 20 U.S.C. §1415(e) (3) .
- 7 Comment to 34 C.F.R. §300.513.
- 8 Southeast Warren Community School District v. Department of Public
Instruction, Case No. 231/63181 (S. Ct. Iowa, (11/14/79) .
- 9 In re John H. Cobb, New York SEA Decision No. 10053 (August, 1979) .
- 10 480 F. Supp. 225 (N.D. Ind. 1979) .
- 11 *Id.* at 228.
- 12 *Id.* at 229.
- 13 635 F. 2d 342 (5th Cir. 1981), *aff'g* 3 EHLR 551:211 (S.D. Fla 1979),
petition for certiorari filed April 22, 1981, Docket No. 80-1770.
- 14 29 U.S.C. §794.
- 15 See also Sherry v. N.Y. State Education Department, 479 F. Supp. 1328
(W.D.N.Y. 1979) .
- 16 635 F.2d at 349.
- 17 *Doe v. Koger, supra*, n. 10.
- 18 Stuart v. Nappi, *supra*, n. 5.
- 19 20 U.S.C. §1415(e) (3) .
- 20 *Doe v. Koger, supra*, n. 10.

LIABILITY FOR WRONGFUL IDENTIFICATION,
EVALUATION OR PLACEMENT - IS THERE MALPRACTICE?

By: Edward W. Remsburg

"Education" and "malpractice" are terms with which we are all quite familiar. Used separately, their meanings are fairly well defined, but in the past several years, these two terms have been wedded to form an unfamiliar but growing body of law known as educational malpractice. Only four short years ago it was said that "There is virtually no law in this area."¹ Yet today, educational malpractice has begun to receive an increasing amount of attention from legal scholars throughout the country.² Although to date the scoreboard is fairly one-sided, the string of educational malpractice cases could well mark the beginning of a serious area of litigation in public education. And special education issues involving identification, evaluation and placement will undoubtedly be on the cutting edge of this developing area of the law.

REVISITING AN OLD ACQUAINTANCE--NEGLIGENCE

The establishment of a cause of action in educational malpractice is no different from any other negligence claim. The following elements of the traditional formula must be satisfied:

1. A duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against reasonable risk;
2. A failure on the part of the actor to conform to the standard required. Both the first and second elements of the formula must go together. An actor's conduct may fall below an accepted standard, but there is no liability if there is no recognized duty to the plaintiff;
3. A reasonably close causal connection between the conduct of the actor or defendant, and the resulting injury to the plaintiff, commonly known as "legal cause" or "proximate cause;"
- (4) Actual loss or damage resulting to the interests of the plaintiff. Threat of future harm is not enough.³

The rules for burden of proof in a negligence case, whether the court or jury finds the facts, require that the plaintiff prove

1. facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by the law for the plaintiff;
2. failure of the defendant to conform to the standard of conduct;
3. that such failure is a legal cause of the harm suffered by the plaintiff; and
4. that the plaintiff has in fact suffered harm of a kind legally compensable by damages.⁴

The proof of these traditional elements of negligence has caused several stumbling blocks to plaintiffs in their attempts to establish a case of educational malpractice. Before reviewing the educational malpractice cases, however, it is important to examine the classification process for handicapped students. As discussed more fully below, the classification process presents unique problems which may give rise to claims of educational malpractice.

IDENTIFICATION, EVALUATION AND PLACEMENT PROCESS

The Education for All Handicapped Children Act of 1975 (hereafter the Act or P.L. 94-142)⁵ has had a great impact on the classification process for handicapped children and the related duties imposed on state educational systems. In passing the Act, Congress expressed a strong concern for the problems of the unidentified educationally handicapped and the establishment of classification and evaluation procedures.⁶

In the Act, at 20 U.S.C. §1412(2)(c), Congress placed upon each participating state and local educational agency a general duty to identify, locate and evaluate every child in need of special education. Individualized education programs for each such child must be established pursuant to an evaluation.⁷ A staffing team, composed of (1) a representative of the public agency, other than the child's teacher, who is qualified to provide or supervise the provision of special education, (2) the child's teacher, (3) one or both of the child's parents, (4) the child, where appropriate, and (5) other individuals at the discretion of the parent agency, is charged with the responsibility of developing, reviewing, and revising a handicapped child's individualized education program. Annual reviews of each child's evaluation and placement must be conducted.⁸ Further explication of the evaluation and

placement requirements is left to the state educational agencies which, in order to qualify for federal funding, must submit their special education plans to the federal education commissioner to guarantee conformity with the federal legislation and regulations.⁹

For example, in Iowa the explication of the evaluation and placement requirements can be found in the Rules of Special Education issued by the Department of Public Instruction.¹⁰ Even there, however, the rules only generally describe the process a student must pass through before a program is provided, since wide discretion is delegated to the area education agencies in Iowa. These agencies are responsible for formulating written procedures to determine the eligibility and placement of children in appropriate special education programs. These procedures must include the use of "diagnostic-educational teams" to compile and analyze relevant data about each child considered, and to recommend a decision regarding a child's evaluation and placement. The diagnostic-educational team, generally called a "staffing," is perhaps the most crucial link in the procedural chain establishing a special education program for handicapped children, for it is at this point that education professionals review the information gathered about a child's special needs and formulate an individualized education plan (IEP) designed to guarantee the most appropriate placement possible. All reevaluations, including special reevaluations requested by parents or school personnel, are conducted by the diagnostic-educational team, which is then responsible for recommending in writing either a continuance of the present placement, transfer to another program, or dismissal from special education with appropriate follow-up measures.

There are numerous problem areas in the identification, evaluation and placement process. First, there is a possibility that the process will result in an overrestrictive classification. For example, a student who presents a discipline problem may be mistakenly classified as having a handicap requiring special education.¹¹ Additionally, a student who requires some special education may be diagnosed as having a more severe problem than he or she actually does. In either situation the classification of the student would be faulty and would result in an overrestrictive classroom environment..

Secondly, the classification process may result in the failure to identify the seriousness of the student's handicap. A student in a regular class may have a handicap but still be ignored if he is not a discipline problem. The teacher may simply consider him a poor student without any particular handicap.¹² Additionally, a student in need of special education may remain in an inadequate special program because his handicap is regarded to be less serious than it really is. Once again, the classification of the student would be faulty.

Finally, even if a handicapped student is properly identified, he or she may still receive an improper classroom placement. Such a case could arise where a disagreement exists between the parents and school district over the

extent to which the handicapped student is to be mainstreamed. A similar problem could arise where a school district has one special education program in which it seeks to place a student when an arguably more appropriate placement may exist in another school district or in a private school. In either case the appropriateness of the particular special education program into which the school places the student would be in question.

In each of these potential problem areas--misclassification of the exceptional child or subsequent wrongful placement--the possibility of an educational malpractice claim exists. However, as is indicated by the following review of education malpractice cases, the bridge between a potential claim and its actual proof has rarely been crossed.

A REVIEW OF THE CASES

The chain of litigation concerning alleged educational malpractice begins with *Peter W. v. San Francisco Unified School District*.¹³ In *Peter W.*, a poorly educated student alleged negligence on the part of the school district with respect to his education in the following particulars:

Defendant School District, its agents and employees negligently failed to use reasonable care in the discharge of its duties to provide plaintiff with adequate instruction, guidance, counseling and/or supervision in basic academic skills and failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances as exemplified, but not limited to the following acts:

1. Negligently and carelessly failed to take notice of plaintiff's reading disabilities
2. Negligently and carelessly assigned plaintiff to classes where the books and other materials were too difficult for a student of plaintiff's reading ability to read
3. Negligently and carelessly allowed plaintiff to pass and advance from a course or grade level although the defendants knew or with the exercise of reasonable care and skill should have known that plaintiff had not achieved the knowledge, understanding, or skills required for completion of said course or grade level and necessary for him to succeed or benefit from subsequent courses

4. Negligently and carelessly assigned plaintiff to classes with instructors not qualified or unable to teach the particular subject and classes not geared towards students with his reading abilities and disabilities
5. Negligently and carelessly permitted plaintiff to graduate from high school although he was unable to read above the eighth grade level¹⁴

Additionally, the plaintiff alleged the tort of misrepresentation, claiming that the defendants fraudulently represented to plaintiff's parents that plaintiff was performing at grade level in reading, writing and other basic skills. On proper motion the trial court dismissed the complaint for failure to state a cause of action. An appeal followed.

The appellate court focused upon the inadequacy of the complaint in alleging the first element in the traditional formula for negligence--the school district's duty of care. The plaintiff argued that the district's duty of care was based on three theories: (1) the assumption of the function of instruction of students imposes the duty to exercise reasonable care in its discharge; (2) there is a special relationship between students and teachers which supports the teachers' duty to exercise reasonable care; and (3) teachers have a duty to exercise reasonable care in instruction and supervision of students, as recognized in decisions holding that public school authorities have a duty to exercise reasonable care for the physical safety of students under their supervision.

The appellate court acknowledged that in common parlance every educator has a duty of care to every student. However, the court further opined that this did not satisfy the technical requirements of "duty of care" in tort litigation. The court emphasized that the application of a "duty of care" to novel situations turns to a great extent upon questions of public policy, including such considerations as

the social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; . . . in the case of a public agency defendant, the extent of its powers, the role imposed upon it by the law and the limitations imposed upon it by budget.¹⁵

In declining to extend a duty of care to the academic educational situation, the court reasoned that

unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject.¹⁶

The California appellate court additionally found that many factors outside the control of the school district could influence a student's progress in school. In such a situation, the court opined that there is no workable rule of care against which the district's alleged misconduct could be measured. Thus, there is no reasonable certainty within the meaning of tort law that the student suffered injury as a consequence of any behavior of the school district. Finally, the court noted that schools today are the object of controversy, public debate, and dissatisfaction. To hold the schools to an actionable duty of care in the discharge of academic functions would expose them to countless tort claims by disaffected students and parents.¹⁷

This precedent-setting California case was cited shortly thereafter in an Iowa educational malpractice case, *Beaman v. Des Moines Area Community College*.¹⁸ The *Beaman* case was brought by students who were enrolled in a telecommunications program offered in a community college. The students contended that the college had failed to comply with certain alleged standards and guidelines pertaining to the course instructor and classroom equipment. The Iowa court addressed this "novel legal question" of educational malpractice by refusing to explicitly expand the concept of negligence to include "complaints arising from the area of academic education." The court, relying on *Peter W. v. San Francisco Unified School District*, refused to recognize a duty of care from the school to students and accordingly sustained a motion to dismiss.

The next educational malpractice case arose in Florida. In *Garrett v. School Board of Broward County*,¹⁹ the court dismissed (with leave to amend) a complaint sounding in educational malpractice. The complaint stated that the student was in twelfth grade and scheduled to graduate in June 1977, although "functioning at approximately the fourth grade level in English and the second to third grade level in math." It was further alleged that the plaintiffs were never informed that an evaluation at the end of the student's third year of school revealed that the student "should be given an opportunity to see what she can accomplish over a period of time enrolled in a clinically oriented day school with individual instruction . . ." Finally, the complaint alleged that the employees of the school resisted the efforts of the parents

to secure an appropriate placement for their daughter, concluding that the school employees were negligent in their handling of the student's case. The court dismissed the complaint with leave to amend, reportedly suggesting that the amended complaint "allege specifically how the School Board is supposed to have violated its duties."²⁰

In *Pierce v. Board of Education of City of Chicago*,²¹ the Illinois Supreme Court decided an apparent educational malpractice case without specifically recognizing it as such. The complaint against the board of education alleged that from 1971 to 1974 the plaintiff student was suffering from a specific learning disability. In spite of the school board's knowledge of the disability, the student was not transferred from the regular course of instruction to special education classes. Further, it was alleged that the school board failed to undertake its own testing and evaluation of the student. As a result, the student allegedly suffered severe and permanent emotional injury requiring hospitalization and medical treatment. The complaint sought damages from the board to compensate for these injuries.

The trial court granted the board's motion to dismiss the complaint. The intermediate appellate court, however, found that the complaint stated a cause of action and reversed the trial court. On appeal to the Illinois Supreme Court, the position of the trial court was sustained. In so holding, the court found that the state constitution's proclaimed goal of "the educational development of all persons to the limits of their capacities" was a statement of general philosophy on education rather than a mandate that certain means be provided in any specific form. Further, the court found that the state statutes and regulations placed the ultimate responsibility for determining a pupil's eligibility for special education on the state board of education and not with the local board. Finally, the complaint did not allege the necessary compliance with state administrative procedures. For these reasons, the Illinois Supreme Court held that the complaint failed to state a cause of action against the local school board.

The next major education malpractice case arose in New York. In *Donohue v. Copiague Union Free School District*,²² a case of first impression in New York, the intermediate appellate court faced the issue of whether to recognize a cause of action for educational malpractice. The plaintiff was a high school student attending a school operated by the defendant school district. The student had received failing grades in several subjects and lacked basic reading and writing skills, but was still permitted to graduate. Thereafter, the student found it necessary to seek tutoring in order to acquire the basic skills which he had not obtained in high school. The complaint sought to recover \$5,000,000 in damages for the alleged deficiencies in his knowledge.

More specifically, the complaint alleged that the school district and its employees had breached their duty to the student in that they

gave to the plaintiff passing grades and/or minimal or

failing grades in various subjects; failed to evaluate the plaintiff's mental ability and capacity to comprehend the subjects being taught to him at said school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate and/or psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as the plaintiff is concerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of the plaintiff; failed to hire proper personnel, experienced in the handling of such matters; failed to teach the plaintiff in such a manner so that he could reasonably understand what was necessary under the circumstances so that he could cope with the various subjects which they tried to make the plaintiff understand; failed to properly supervise the plaintiff; failed to advise his parents of the difficulty and necessity to call in psychiatric help, and that the processes practiced were defective and not commensurate with a student attending a high school within the County of Suffolk; failed to adopt the accepted professional standards and methods to evaluate and cope with plaintiff's problems, which constituted educational malpractice.²³

In its opinion, the intermediate appellate court stated that the question of whether in any particular set of circumstances one party owes a duty of care to another is entirely one of law to be determined by the courts.²⁴ The court further opined that the judicial recognition of the existence of a duty of care is dependent upon principles of sound public policy, including

moral considerations arising from the view of society towards the relationship of the parties, the degree to which the courts should be involved in the regulation of that relationship and the social utility of the activity out of which the alleged injury arises: preventative considerations, which involve the ability of the defendant to adopt practical means of preventing injury, the possibility that reasonable men can agree as to the proper course to be followed to prevent injury, the degree of certainty that the alleged injuries were proximately caused by the defendant and the foreseeability of harm to the plaintiff; economic considerations, which include the ability of the defendant to respond in damages; and

administrative considerations, which concern the ability of the courts to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff's case . . .²⁵

The majority of the intermediate appellate court set forth four reasons for dismissing the educational malpractice claim: (1) the courtroom is an improper forum in which to evaluate varied theories of learning; (2) the recognition of educational malpractice would lead to a flood of litigation; (3) the state constitutional provision requiring the establishment of free common schools and its enabling legislation confers the benefit of a free education upon the general public but does not create a duty to educate giving rise to a cause of action; and (4) even if there was a duty to educate the student, it would be extremely difficult to show the requisite causal relationship between the school's failure to educate and the student's illiteracy. Accordingly, the court held that the public policy of New York recognizes no cause of action for educational malpractice.

In contrast, the dissent relied on statutory language and the state education department's rules and regulations to find that the school district had a duty to educate the student. The dissent, in answering the concerns expressed in the majority opinion, stated that

initially, it must be emphasized that the policy considerations enunciated in *Peter W.* do not mandate a dismissal of the complaint. Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial. The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts.²⁶ (citations omitted)

After reviewing the state education department's rules and regulations, the dissent concluded that

. . . the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition and (2) treat the condition, and instead allows the patient to suffer the inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to learn. Although mindful of this learning disability, the school authorities made no attempt, as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter to take or recommend remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the educational system without any attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and, like the latter, is sufficient to withstand a motion to dismiss.²⁷

Following the decision by the court in the Appellate Division, the *Donohue* case was appealed to the New York Court of Appeals.²⁸ The court stated that "it may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded."²⁹ However, this conclusion in itself did not answer the question whether a complaint seeking monetary damages for educational malpractice stated a cause of action cognizable in court. The court continued:

The fact that a complaint alleging "educational malpractice" might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. The heart of the matter is whether, assuming that such a cause may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not.³⁰

The court refused to recognize the malpractice claim on the principle that complaints of educational malpractice are for school administrative agencies, rather than the courts, to resolve:

To entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies --a course we have unalteringly eschewed in the past--but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.³¹

A special concurrence concluded that the practical problems raised by an educational malpractice claim are so formidable that such a legal theory should not be cognizable. These problems included

the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student. Factors such as the student's attitude, motivation, temperament, past experience, and home environment may all play an essential and immeasurable role in learning. Indeed, as the majority observes, proximate cause might 'be difficult, if not impossible, to prove.'

The decision in *Donohue* to not recognize a cause of action for so-called educational malpractice did not deter another student in New York from attempting to recover on a similar theory. In *Hoffman v. Board of Education*,³³ very specific allegations of negligence were presented and proven to a jury. Evidence was offered that the student-plaintiff, who had a speech defect, was given an I.Q. test at age five. As a result of the test, which required an oral response, the plaintiff received an I.Q. score of 74. The evidence further showed that the cut-off point for placement in mentally retarded classes was a score of 75. In the previous year the student had been tested with an I.Q. test which required a functional response rather than an oral response and had attained a score of 90. It was acknowledged by the clinical psychologist performing the test on which the student scored 74 that the student's speech defect prevented an accurate assessment of the student's I.Q. The psychologist recommended that the student be given speech therapy and be retested in two years.

In spite of the psychologist's recommendation, however, the student was placed in classes for the mentally retarded where he remained without any retesting for 13 years until he was graduated at age 18. The student

contended at trial that the failure to retest was a violation of good policy and practice, while the local board argued that the student had received an adequate education in spite of the placement in a class for the mentally retarded. The case was tried before a jury and the student was awarded a verdict of \$750,000.

An appeal of the jury award was taken.³⁴ The Appellate Division, with two justices dissenting, affirmed the judgment as to liability, predicated the affirmance upon the local board's failure to administer a second intelligence test to the student. The court characterized the failure to retest as an affirmative act of negligence, actionable under New York law. In so holding, the court distinguished *Donohue* upon the ground that the negligence alleged in that case was a failure to educate properly (nonfeasance), whereas the present case involved an affirmative act of misfeasance. However, the court also held that the award of \$750,000 was excessive and would have reversed the judgment and required the plaintiff to retry the issue of damages had he not consented to a reduction in the amount of the verdict from \$750,000 to \$500,000.

The decision of the appellate division was appealed to the New York Court of Appeals where it was reversed.³⁵ The majority noted at the outset that the cause of action sounded in educational malpractice. After reviewing its holding in *Donohue*, the court stated that

in order to affirm a finding of liability in these circumstances, this court would be required to allow the finder of fact to substitute its judgment for the professional judgment of the Board of Education as to the type of psychometric devices to be used and the frequency with which such tests are to be given. Such a decision would also allow a court or a jury to second guess the determinations of each of plaintiff's teachers. To do so would open the door to an examination of the propriety of each of the procedures used in the education of every student in our school system. Clearly, each and every time a student fails to progress academically, it can be argued that he or she would have done better and received a greater benefit if another educational approach or diagnostic tool had been utilized. Similarly, whenever there was a failure to implement a recommendation made by any person in the school system with respect to the evaluation of a pupil or his or her educational program, it could be said, as here, that liability could be predicated on misfeasance. However, the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of this state.

In our view, any dispute concerning the proper placement of a child in a particular educational program can best be resolved by seeking review of such professional educational judgment through the administrative processes provided by statute.³⁶

A dissent was filed by three judges in which it was stated that the case did not involve educational malpractice, but rather

discernible affirmative negligence on the part of the Board of Education in failing to carry out the recommendation for reevaluation within a period of two years which was an integral fact of the procedure by which plaintiff was placed in a CRMD class, and thus readily identifiable as the proximate cause of plaintiff's damages.

Thus, on a 4-3 vote, the New York Court of Appeals decided to dismiss Hoffman's complaint.

In a recent Fourth Circuit case, *Sandlin v. Johnson*,³⁷ brief mention was made of the concept of educational malpractice. In *Sandlin* a class action was instituted by four second grade students on behalf of themselves and other similarly situated second graders, against the principal, superintendent and school board members. The plaintiffs sought injunctive and monetary relief against the defendants for denying them educational opportunities commensurate with their abilities and comparable to opportunities provided other similarly situated students. They sued pursuant to 42 U.S.C. §1983 claiming a denial of equal protection of the law because, as their complaint stated

by either the defendants' negligent and careless supervision of the instruction of plaintiffs or by their arbitrary and negligent grading and classification of these plaintiffs, plaintiffs have been effectively denied third grade educational opportunities commensurate with their abilities and in accord with educational opportunities provided other students similarly situated in the Pennsylvania County School System.

The plaintiffs contended that defendants' actions damaged them by delaying the completion of their education and their obtaining employment, by foreclosing certain lucrative employment because of a lack of education provided them commensurate with their abilities, and by burdening them with the stigma of failure.

Prior to trial, the district court *sua sponte* issued an order dismissing the suit on the ground that federal courts should abstain from resolving controversies which involve administration by a state or subdivision of its own affairs. Plaintiffs appealed.

In reviewing that portion of the complaint which alleged educational malpractice, the appellate court stated that

plaintiffs also claim that defendants or the teachers under their supervision negligently and carelessly failed to ensure that plaintiffs were properly and adequately taught. What appellants denominate a denial of equal educational opportunity sounds rather in tort as a breach of some duty owed by teachers or school boards to their pupils to give them an education. If there is any such cause of action, it does not rise to the level of a constitutional claim and therefore, is not cognizable in an action pursuant to 42 U.S.C. §1983.³⁸

The appellate court, in affirming the district court's dismissal, concluded by indicating that decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context.

A Connecticut case raised the question of whether or not an implied private remedy for damages can be read into the provisions of the Act and its statutory predecessors.³⁹ In *Loughran v. Flanders*,⁴⁰ a 15-year-old learning disabled minor filed a complaint pursuant to the provisions of the Act. The complaint sought a court order requiring the board members to implement an individualized course of instruction for the student,⁴¹ as well as \$1,000,000 in damages for the alleged negligence of the board members in failing to implement an appropriate educational program earlier in the student's school career.

The federal district court noted that the standard for determining whether a private damage remedy is implicit in a statute not expressly providing for one was enunciated by the Supreme Court in *Cort v. Ash*.⁴² Under the *Cort* standards, the district court found that the legislative histories of the special education statutes are devoid of even the slightest suggestion that Congress intended them to be a vehicle through which to initiate a private cause of action for damages. Furthermore, the court opined that the recognition of claims like the plaintiff's would cause special education programs to suffer, since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should

the innovations fail. Finally, the court stated that the purported course of action is one traditionally relegated to state law. The court concluded that to recognize the plaintiff's alleged cause of action for monetary damages would be contrary to both the history and purpose of the Act and its statutory predecessors. Accordingly, the court granted the board's motion to dismiss the complaint.

The same result was reached in a case from the Eastern District of Missouri. In *Miener v. State of Missouri*,⁴³ the court agreed with the decision in *Loughran* that a private cause of action for damages should not be implied under P.L. 94-142.

Several more recent cases have continued to wrestle with the question of whether or not an implied private remedy for damages can be read into the provisions of the Act. For example, in *Anderson v. Thompson*,⁴⁴ the federal district court in Wisconsin found no legislative history to indicate that Congress intended to create a private cause of action for damages under the Act. The court concluded that §1415 of the Act is aimed at establishing procedures to obtain an appropriate placement and program for a child with exceptional educational needs and not at compensating the child for past deficiencies in the provision of a special education.

Similarly, in *Hines v. Pitt County Board of Education*,⁴⁵ the federal district court in North Carolina refused to find an implied private remedy for damages in P.L. 94-142.⁴⁶

However, in *Boxall v. Sequoia Union High School District*,⁴⁷ the court found that the language in 20 U.S.C. §1415(e)(2), which calls for the court to grant appropriate relief, authorized the court to grant damages in the form of reimbursement to the parents who had financed a homebound program for their son.⁴⁸

Finally, a state circuit court in Maryland in 1979 refused to recognize educational malpractice as a cause of action in Maryland.⁴⁹ The court cited both *Peter W.* and *Donohue* in holding that no duty to provide an adequate education existed toward the individual student. The court concluded that it would be a sad state of affairs if juries were able to decide whether or not the school system had functioned properly.

A LOOK TO THE '80s

In spite of the lack of success by plaintiffs in educational malpractice cases, several factors lead to the conclusion that more and more claims for educational malpractice will be brought in the 1980s, with issues from the area of special education likely leading the way.

First, courts to date have been reluctant to find a "duty of care" on the

part of the local school districts that would satisfy the traditional requirement of a negligence action. However, in special education, P.L. 94-142 arguably contains that elusive duty of care which is missing in other non-special education cases. Historically, as statutes have become more prescriptive, the possibilities for courts adopting them as a statutory standard of care have increased, along with their applicability in negligence actions. In P.L. 94-142, Congress has enacted a statute which is prescriptive in nature and which may well become the new standard of care by which courts measure the actions or inactions of school districts in their evaluation and placement of special education students.

Second, courts have expressed in the past a reluctance to become involved in the actual daily operation of schools. Yet judicial review has already been afforded to some of the most significant aspects of educational policy: school desegregation,⁵¹ finance,⁵² curriculum,⁵³ personnel practices,⁵⁴ and discipline.⁵⁵ In light of this judicial trend, courts will be susceptible to the argument that the recognition of a claim for educational malpractice is no more of an intrusion into the daily operation of a school than the other now-accepted judicial actions.

Thirdly, courts have feared a flood of new litigation if they recognized the educational malpractice cause of action. However, such a concern can easily fade away if the right case is brought before a court. In other words, if a court is presented with a gross violation, its concern for the flood of new litigation will likely be forgotten.

Finally, courts have seemed reluctant to award damages in educational practice claims because of the novelty and the undeniable speculativeness and subjectivity of such damage claims. Plaintiffs have helped create this reluctance by making claims for astronomical amounts of money in such suits. These high damage claims tend to confirm the courts' feelings that educational harms are incapable of practical monetary evaluation and divert their attention from the more concrete approaches to assessing damages. If plaintiffs shift their approach in the future to an emphasis on smaller amounts of damages and orders of affirmative relief, their chances of succeeding on claims for educational malpractice will increase.

On the other side of the coin, school districts must continue to emphasize those arguments which have been so persuasive to date. First and foremost, districts must urge that the courtroom is an improper forum in which to evaluate broad educational policies, as well as their day-to-day implementation. The responsibility for the administration of our public school system belongs to the school administrative agencies, not the courts. Second, the flood-gate argument must still be made. As court dockets across the country continue to be a headache, most courts will be sensitive to their inability to cope with a flood of new litigation. Third, the difficulties in showing the requisite causal relationship between the failure of the defendant to conform to the standard of conduct and the harm suffered by the plaintiff

must continue to be stressed. Although this can be considered a question of proof to be resolved at trial, it can also be viewed as a legitimate public policy reason for the nonrecognition of such a claim. Finally, districts must cite to the courts the growing body of case law which has already refused to recognize the claim for educational malpractice.

In the end, the most important factor affecting future claims of educational malpractice may be the extent to which school districts, their personnel, and their legal counsel keep abreast of the ever-changing requirements in special education. Truly an ounce of prevention will be worth a pound of cure.

FOOTNOTES

- 1 Comment: Educational Malpractice, 124 U.Pa.L.Rev. 756 (1976).
- 2 Recent law review articles on the subject of educational malpractice include Comment, Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction, 58 N.W.C. Rev. 561 (1980), Educational Malpractice and Special Education Law, 55 Chi.-Kent L. Rev. 685 (1979), and Legal Remedies for the Misclassification or Wrongful Placement of Educationally handicapped Children, 14 Colum. J.L.S.P. 389 (1979).
- 3 W. Prosser, Handbook of the Law of Torts §30 at 143-144 (4th ed. 1971).
- 4 Restatement (Second) of Torts §328A (1965).
- 5 20 U.S.C. §1400 *et seq.*
- 6 See S. Rep. No. 168, 94th Cong., 1st Sess. 18, reprinted in U.S. Code Cong. & Ad. News 1425, 1442 (1975).
- 7 See 20 U.S.C. §1412(4).
- 8 See 20 U.S.C. §1414(a) (5).
- 9 See 20 U.S.C. §1413(a).
- 10 Iowa Admin. Code §§670-12.1 to .42 (1975).
- 11 See Kirp, Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Calif. L.Rev. 40, 50-52 (1974).
- 12 *Id.* at 50.
- 13 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).
- 14 First Amended Complaint at 6-8, Doe v. San Francisco Unified School Dist., No. 653-312, Calif. Super. Ct. (1974).
- 15 Peter W. v. San Francisco Unified School District, 60 Cal.App.3d at 827, 131 Cal. Rptr. at 862.
- 16 *Id.* at 824, 131 Cal. Rptr. at 860-61.
- 17 The court disposed of the claim of misrepresentation, noting that the essential element of detrimental reliance upon the alleged misrepresentation was not alleged in the complaint.

- 18 Beaman v. Des Moines Area Community College, Law No. CL15-8532 (Iowa
1978).
- 19 No. 77-8703, 17th Judicial Cir. (Florida, Dec. 5, 1977).
- 20 Fort Lauderdale News, 8/4/77.
- 21 69 Ill.2d 89 (1977).
- 22 64 A.D. 2d 29.(1978), *aff'd*, 47 N.Y. 2d 440 (1979).
- 23 *Id.* at 31-32.
- 24 *Id.* at 33.
- 25 *Id.*
- 26 *Id.* at 41-42.
- 27 *Id.* at 44.
- 28 47 N.Y.2d 440, 391 N.E. 2d 1352 (1979).
- 29 *Id.* at 1353.
- 30 *Id.* at 1354.
- 31 *Id.*
- 32 *Id.*
- 33 No. 71-12593 N.Y. Sup. Ct. (1976).
- 34 64 A.2d 369 (1978).
- 35 Hoffman v. Board of Education of the City of New York, 47 N.Y. 2d 440,
391 N.E. 2d 1352.
- 36 *Id.*
- 37 643 F.2d 1027 (4th Cir. 1981).
- 38 *Id.* at 1028.
- 39 20 U.S.C. §1401 *et seq.* The same issue has been raised under §504 of
the 1973 Rehabilitation Act with a resulting split of authorities. For
example, in *Miener v. State of Missouri*, 498 F. Supp 944 (E.D. Mo.), the
court held that a private cause of action for damages should not be
implied under §504. In contrast, in

Patton v. Dumpson, 3 EHLR 551:526 (S.D.N.Y. January 23, 1980), the court held that a private cause of action for damages should be implied under §504.

- 40 470 F. Supp. 110 (D. Conn. 1979).
- 41 After the complaint was filed, the parties agreed upon an educational program, thus mooted that portion of the complaint seeking affirmative equitable relief.
- 42 422 U.S. 66, 95 S. Ct. 2080 (1975).
- 43 498 F. Supp. 944.
- 44 495 F. Supp. 1256 (E.D. Wisc. 1980).
- 45 497 F. Supp. 403 (E.D.N.C. 1980).
- 46 See also Stubbs v. Kline, 463 F. Supp. 110 (W.D. Pa. 1978).
- 47 464 F. Supp. 1104 (N.D. Cal. 1979).
- 48 See also Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Mahoney v. Administrative School District, 42 Or. App. 665, 601 P.2d 826 (1979).
- 49 Doe v. Board of Education of Montgomery County, Cir. Ct. Md. (1979).
- 50 See Wilkinson, Goss v. Lopez: The Supreme Court as School Superintendent, 1975 Sup. Ct. Rev. 25.
- 51 See, e.g., Milliken v. Bradley, 418 U.S. 717 (1974).
- 52 See, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
- 53 See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968).
- 54 See, e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).
- 55 See, e.g., Wood v. Strickland, 420 U.S. 308 (1975).

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